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Task Force on Conflict of Interest | Groupe de travail sur les conflits d'intérêts

ETHICAL CONDUCT IN THE PUBLIC SECTOR

Report of the Task Force on Conflict of Interest

Hon. Michael Starr **Hon. Mitchell Sharp**
Co-Chairmen

J. Patrick Boyer
Executive Director

Canada

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CHAPTER 1

INTRODUCTION AND PRELIMINARY MATTERS

(a) Overview

Ethical conduct on the part of those who work in government has about it a paradoxical quality: we seem to worry most about it only on the occasions when a departure from the acceptable norm takes place. One could say that interest in "conflict of interest" problems ebbs and flows in direct relation to the frequency and intensity of allegations about the way government business has been conducted, or revelations about improper conduct.

Perhaps this is as it should be, and is itself an encouraging sign: ethical conduct is taken for granted; individuals are assumed to be operating honourably. Thus when someone abuses the trust that accompanies a public office, the abuse is seen as aberrant behaviour, something which should not go unpunished. The assumption that individuals should, and do, conduct themselves with propriety and in deference always to the public interest, remains generally unchallenged.

This state of mind is central to understanding the Canadian approach to matters of conflict of interest. There is frequently proof that those working in government are as human as individuals elsewhere, in that temptations which arise are not always resisted and Canada has had its share of difficulty arising out of alleged conflict of interest situations in government. Yet in comparison with certain other countries, where the political system is grounded on forms and practices of systemic corruption in government, Canada appears almost squeaky clean. The political culture of the country or region largely determines not only whether bribery and abuse of office occur, but what the attitude toward such practices will be.

It is by Canadian standards, not those of others, that performance must be judged. It is within our tradition of laws, public administration and parliamentary practice that the present state of the rules which govern ethical conduct in the federal government must be evaluated.

(b) The Mandate of Our Task Force

The mandate of the Task Force to undertake a general review of policies and practices which do and should guide the conduct of present and former public office holders in the federal government, and to make recommendations in this area is established in two documents. The first of these is a letter from you, Prime Minister, dated July 7, 1983 addressed to each of us as Co-Chairmen of the Task Force; the second is the specific "terms of reference" appended to that letter.

For the record, and for the benefit of others reading this report, your letter and the terms of reference of the Task Force read as follows:

> Several months ago there was considerable debate on the nature of policies and practices that should guide the conduct of present and former office holders. As you know, policies and practices in this area require a delicate balance. On the one hand, the public interest requires the recruitment to public office of highly-qualified individuals from diverse backgrounds to participate in the public affairs and public administration of Canada. On the other hand, such office holders must carry out their official duties and arrange their private affairs in a manner that maintains public confidence and trust in government. Similarly, after their period of public service such office holders should be able to return to fulfilling employment within the community-at-large. Their actions in this regard, however, should not cast doubt on the probity or impartiality of the public policy process.
>
> Since 1973 I have developed, in consultation with my colleagues, a series of policies and practices respecting the conduct of present and former public office holders. The establishment of such policies, as they apply to Ministers, Parliamentary Secretaries, exempt staff and full-time Governor-in-Council appointees, is a matter which falls within

the prerogatives of the Prime Minister. The effect of these initiatives has been the establishment of one of the most rigorous sets of practices and policies governing the conduct of office holders in any political jurisdiction, and restrictions on the financial and commercial activities of former Ministers which are among the most onerous of any Parliamentary democracy.

When, in 1976, I tabled policy proposals regarding the activities of present and former holders of public office, I was attempting to reconcile the benefit to society which results from the movement of individuals among the various sectors of society -- governmental, commercial, industrial, academic and professional -- with the need to protect the integrity of government service, and prevent private exploitation of the public trust. In my mind, policies in these areas would need to be reviewed from time to time to ensure they are fair and workable, and that they provide an effective means for dealing with the matters of conscience and judgement which are at issue here and which do not lend themselves to the more rigid codifications of law.

Judging from recent debate on this issue, it is clear that some would argue that any official dealing between present and former office holders gives the appearance of preferential treatment or wrongdoing. Such interpretations in my judgement not only go beyond the spirit and intent of the policies and practices developed by the Government of Canada but could also significantly and adversely affect the recruitment of highly-qualified individuals from diverse backgrounds to participate in public life.

For these reasons and consistent with my prerogatives and responsibilities in this area, I believe that it is in the public interest that a study be undertaken of the

policies and practices that should govern the conduct of Ministers, Parliamentary Secretaries, exempt staff, and full-time Governor-in-Council appointees during and after their period of public service. The results of such a study would be useful as well in reviewing policies in this area governing public servants...

I would hope that your study would focus in particular on the need to ensure both public confidence in and the integrity of the governmental process and the need to attract to government individuals of high calibre from all walks of life. I do not mean this to be a study of past conduct but rather an effort to establish the best means of conserving and enhancing the public trust and confidence in government...It would be my intention that your report be made public shortly after its receipt.

In reviewing the best means to achieve the objectives just outlined, I would ask that ... you seek views on the conflict of interest and post employment régime that should apply, review practices in this area in other political jurisdictions both domestic and international and in the private sector and ensure that any approaches you may propose in this area are consistent with the Canadian Charter of Rights and Freedoms and the principles of the Canadian Parliamentary system.

...The question of finding the appropriate balance between the requirement of attracting to public service men and women of high ability from all walks of life, while ensuring that the public trust is and is seen to be safeguarded, is of major importance. It is essential that Canadians have trust in their government and its processes and in the calibre of individuals who commit themselves to public service. Nothing less than the quality of government in Canada is at stake.

TERMS OF REFERENCE

Understanding that:

1. the public interest requires the recruitment to public office of highly qualified individuals from diverse backgrounds to participate in the public affairs and public administration of Canada; and that,

2. such office holders should carry out their official duties and arrange their private affairs in a manner that conserves and enhances public confidence and trust in government; and that,

3. after their period of public service such office holders should be able to return to fulfilling employment within the community-at-large; and that,

4. the actions of former office holders should not cast doubt on the probity and impartiality of the public policy process; and finally that,

5. it is essential that the above factors be considered in the establishment of the best means to guide the conduct of such office holders during and after their period of public service,

the Task Force shall examine and report to the Prime Minister on the policies and practices that should govern the conduct of Ministers, Parliamentary Secretaries, exempt staff, full-time Governor-in-Council appointees and public servants during and after their period of public service, having particular regard to the need to ensure both public confidence in and the integrity of the governmental process and the need to attract to government individuals of high calibre from all walks of life.

And without restricting the generality of the foregoing the Task Force shall:

(a) review available information with respect to the experience with existing conflict of interest and post-employment guidelines insofar as it is relevant to the establishment of policies and practices for the conduct of office holders during and after their period of public service;

(b) review available information with respect to experience in this area in other political jurisdictions both domestic and international and in the private sector;

(c) ensure that proposed approaches in this area are consistent with the Canadian Charter of Rights and Freedoms;

(d) develop proposed approaches in this area in light of the principles of the Canadian Parliamentary system.

(c) Interpretation of Our Mandate

The "Gillespie Affair", as implied in your letter, was a catalyst leading to the formation of our Task Force, but this was a timely development, since we have concluded that the present rules and procedures require significant reformulation in any event. The policies and rules currently in force have developed in a rather piecemeal fashion, and contain serious problems both in interpretation and administration. As you stated, Prime Minister, policies in the area of conflict of interest and post-employment "need to be reviewed from time to time to ensure they are fair and workable."

Our terms of reference are clear, constituting one of the best statements of the central issue -- the need to balance ethical rules with the practical demands of recruiting qualified individuals to public service -- yet made. However, three subject areas required interpretation of the nature and extent of our mandate. These areas involved the public service, the judiciary, and Parliament.

First, with respect to the public service, your letter, Prime Minister, speaks of reviewing policies and practices which should govern the conduct of ministers, parliamentary secretaries, exempt staff, and full-time Governor-in-Council appointees, adding that "The results of such a study would be useful as well in reviewing policies in this area governing public servants". As will be seen from this report, we have recommended a system which we believe represents a significamt new stage in the Canadian way of dealing with such matters, and in devising such an approach we have tried to do so on a comprehemsive and integrated basis. For this reason, we have done more than "suggest approaches" which might be applicable to the public service; we have recommended a system which, if implemented, will accommodate the requirements of officials at all levels, including cabinet ministers, their exempt staff, parliamentary secretaries, full-time Governor-in-Council appointees and public servants.

Second, with respect to the judiciary, we are mindful of the fundamental importance in our system of government of the concept of judicial independence. For the public to have confidence in the administration of justice, our courts must be free and must appear to be free from government interference. Thus, while federally appointed judges come within the category of Governor-in-Council appointees, and therefore squarely within the terms of our mandate, we concluded that the present arrangements should remain unaltered. We refer to the arrangements whereby a Judicial Council has been created, as a result of amendments to the Judges' Act in 1975, to handle matters pertaining to the conduct of judges. Conflict of interest rules which are generally applicable to government office holders should not in our view be extended to the judiciary, which should continue to be governed by its own rules and procedures as developed pursuant to the Judges Act. This subject is discussed more fully in Chapter 16 as is the complex matter of "quasi-judicial" appointees, with respect to whom a proposal is made. In interpreting our terms of reference, we recommend the preservation of the current arrangements for maintaining judicial independence.

Third, with respect to parliamentarians, we are again faced with the concept of independence, this time of Parliament. An examination of our terms of reference shows that the only group excluded from our study is members of Parliament, i.e. Members of the House of Commons and Senators. However, it is from this group that Cabinet ministers and parliamentary secretaries, who do come within our terms of reference, are selected. For this reason, we thought it necessary to take note of the basic rules governing conflicts of interest and parliamentarians, as established both by statute and by those Standing Orders which govern such matters. These provisions are considered because they establish certain basic rules for ethical conduct on the part of members of Parliament, constituting the legal foundation upon which the further guidelines for parliamentary secretaries and Cabinet ministers have been built. In order adequately to address the conflict of interest rules respecting ministers of the Crown, it is necessary to take cognizance of rules which govern those same individuals as members of Parliament. This interpretation seems to us to be in accord with your direction to us, Prime Minister, to observe "the principles of the parliamentary system." Nevertheless, we recognize the traditional concern for the independence of Parliament, which suggests that any substantive proposals in this realm are more properly dealt with by parliamentarians, perhaps in the fashion outlined in the 1973 federal government Green Paper, Members of Parliament and Conflict of Interest.

(d) General Approach to Our Review

It was not within our mandate to investigate allegations of misconduct by public office holders, and we did not do so. The ethical standards of those who hold public office in the federal government of Canada and its agencies are high, and serious problems of misconduct are exceptional.

Our recommendations are not inspired by the need to establish new or more rigid standards of conduct or for more rigorous application of procedures to minimize conflicts of interest. We make this comment because our recommendation, later in this report, for the establishment of an Office of Public Sector Ethics might be misinterpreted as indicating the urgent need for a new "watch-dog" to protect the public interest. That would certainly be the wrong emphasis to place on it.

We have found, however, a clear need to develop the existing guidelines into a structure of principles and procedures which can be more readily understood by public office holders, Parliament and the public, which can be adapted to the circumstances of office holders with varying responsibilities, and which will result in greater consistency in application. We believe that our recommendations, if adopted, would not result in any significant increase in the bureaucracy or in costs of administration.

We have been conscious of the double responsibility laid upon us by our terms of reference, concerning "the need to ensure both public confidence in the integrity of the governmental process and the need to attract to government individuals of high calibre from all walks of life."

The two of us entered Cabinet, one in 1957 and the other in 1963, when there were no written guidelines for ministers or, for that matter, for appointed officials. (Although several departments had written guidelines, there was none that applied service-wide.) There were certain understandings that ministers would resign any outside employment or directorships and would take whatever steps they considered necessary to avoid conflicts of interest. There were, however, no requirements to divest oneself of securities either by their sale or by putting them into a trust. Neither were there any written rules relating to the activities of former public office holders. An honour system prevailed.

So far as we can recall, ethical standards of conduct in the federal government were as high then as they are today. The need to attract to government individuals of high calibre was present 25 years ago just as it is today. The difference is that today one of the reasons cited, especially by active businessmen, for not entering public service is that the present guidelines add to the financial sacrifices incurred while in office and to the difficulties of re-establishing oneself when one's public career is at end.

In Canada, a group of public men and women have had long and continuous service as members of Parliament, some of whom have been in and out of office as ministers of the Crown. However, we do not, as in some other countries, have many "professional politicians", that is, people who look upon political activity as a life-time career, with occasional interruptions when the electorate decides it wants a change. In Canada, the rate of turnover of members of Parliament at election time is high. Consequently, Cabinet has had many people who have spent a good part of their lives in professions, business or farming and who intend to return to private life when their political careers come to an end, voluntarily or involuntarily.

This state of affairs is good for the health of Canadian democracy. Those who govern us should not be a special group of professionals without a significant stake in the community. Surely we do not want people in government who are so narrowly involved in the Canadian community and so one-dimensional that they have no conflicting interests. We stress that it is not the existence of conflicts -- a natural and desirable state of affairs -- which is important, but rather how those conflicts are resolved. They must be resolved in favour of the public interest.

Our governors should continue to include people who are prepared to give up their private activities in which they have been successful and enter government for a time as a public service. It is no longer sufficient to say that successful people who have a sense of public duty ought to be prepared to accept the inevitable sacrifices involved in public office, whatever they may be. There is little point in having rules which add unnecessarily to those considerable sacrifices which are already part of the job.

We do not question the necessity of written rules of conduct and procedures to minimize conflicts of interest. We recognize the great change that has taken place in the public attitude towards government since the days when we first entered

Cabinet. A number of factors can be suggested for this change, but we do not need to speculate here as to which of the various causes is the most significant. It is enough that we deal with the reality, which is the existence of exacting standards of conduct expected from those in public positions. This is the context within which we approach this subject.

The existing guidelines for public office holders in the federal government of Canada are more comprehensive and rigorous than many of those in the provinces of Canada and in the other parliamentary democracies we have examined. It is very difficult to compare Canada and the United States in this respect, since their system of ethical rules is very different and elaborate and takes the customary American form of laws with specific penalties for breaches of the law, and all the rights of 'due process.'

Obviously, there can be no turning back to the time when we first entered the Cabinet. Guidelines may not have raised the already high standards of conduct of public office holders in the federal government of Canada, and they may not have had much to do with enhancing public confidence in government, but this is difficult to measure. In one sense, the experience of a decade is not yet sufficient to render a definitive verdict on the extent to which the guidelines have served a useful purpose. We have no doubt that written rules bring substantial (actual and potential) benefits, although their impact may be hard to quantify. Moreover, they have come to be accepted as necessary and their withdrawal at this stage would, in our opinion, only serve to reduce confidence in government.

There is every reason, however, for the government to strive to achieve simplicity, fairness and reasonableness in its approach to questions of ethical conduct, especially in the sphere of conflict of interest. Wise public policy will avoid imposing unnecessarily harsh restrictions which discourage individuals of high calibre and integrity from seeking, accepting or remaining in public office. Overly strict rules do nothing to enhance confidence in government, and can even become counter-productive when honest people are driven to avoid them because the literal application of such rules can produce manifestly unfair results. This is not just theory. We have seen and heard too many examples of how the present system is unreasonable because it lacks the discretionary element to adjust to circumstances, to differentiate between the important and the trivial, and to distinguish between the letter of the law and its spirit. This is examined in detail later in this report.

(e) Operation of the Task Force

The work of the Task Force has involved a wide-ranging and thorough review of a complicated subject. The matter of ethical conduct and the operation of modern government raises profound questions both in the philosophical and administrative realms. The work has been accomplished in fairly short order as a result of an intensive effort.

Following our appointment as Co-Chairmen, J. Patrick Boyer, of Toronto, a lawyer and author of several books dealing with legal and historical aspects of the matters under review by our Task Force, with experience in government at both the federal and provincial levels, was appointed Executive Director of the Task Force. Mr. Boyer wrote much of this report, in addition to performing his other responsibilities, and we wish to acknowledge his admirable work.

Secondments to the Task Force were arranged for several people from within the federal government having particular knowledge about conflict of interest matters. Judy Lockett, Head of the Policy Review Section, Policies and Procedures Group, was seconded from the Treasury Board Secretariat, to serve as Special Assistant to the Executive Director, and handled a range of research and administrative duties throughout the period of our Task Force's operation.

Seconded for briefer research assignments were Michael Vaughan, Senior Policy Analyst, from the Public Service Commission; and Brian Tannenbaum from the Auditor General's Office. The services of two retired senior public servants, Dino Cawadias and Russell Steward, were obtained for consultation and research on specific areas under review. Administrative Officer for the Task Force was Alan Quinn, of the Northern Pipeline Agency. Thelma Nicholson of the Privy Council Office acted as Recording Secretary for all our hearings, and Jim Ferguson of the Privy Council Office assisted with matters of administration. Pauline Sabourin served as Administrative Assistant to the Task Force. Exceptional secretarial services were provided by Denise Goudreau and Francine Chabot. Editing was done by Margaret Whitridge on secondment from the Public Service Commission. We are grateful for the assistance and dedicated efforts of each of these individuals.

In conducting our review, all the usual methods for gathering information were employed. A number of officials currently involved in interpreting or administering ethical

conduct policy in the federal Government were consulted. Indeed, we are particularly grateful for the "inside view" of conflict of interest matters which could only have been obtained from officials who were there at the time.

The Assistant Deputy Registrar General, G.J. Robert Boyle, and members of his staff, including the Director of the Standard of Conduct Advisory Group, Peter Herbert, provided us with continuing and invaluable collaboration during the course of our review.

An advertisement which explained the purpose of the Task Force and invited written submissions and phone calls was published in 111 daily newspapers and six special interest papers across the country. This advertisement appeared on two separate occasions, and generated a considerable response as well as many useful ideas, which are included in our report. The advertisement also brought in a variety of specific complaints, several allegations, and suggestions which were outside our mandate. We responded to all those who contacted us.

We wrote to all current ministers, members of Parliament, senators, deputy ministers and heads of agencies soliciting their views and opinions. Letters were also sent to a number of former public office holders.

The views of 65 Crown corporations, 134 private companies and businesses and 15 bargaining agents representing both the public and private sectors were solicited.

Numerous interviews were held with those who responded to the letters and to the newspaper advertisement. In addition, interviews were held with individuals who, over the last few years, have been the subject of alleged conflicts of interest.

Scores of informal "interviews" or discussions have also taken place over the past several months, as we met with individuals from the public and private sectors, to talk about conflict of interest issues, and to test ideas. Many of our ideas and insights resulted from dialogue with experienced and knowledgeable people as much as from formal study of materials.

The codes of ethics and conduct of various professional associations in Canada, and from several dozen Canadian business corporations, were obtained and studied.

Extensive liaison was conducted with the United States to study their system in terms of both legislation and their experience to date. The practices of the governments of the United Kingdom, Australia and New Zealand were studied on the basis of documents and reports received, and were assessed in terms of the requirements of Canada. We also reviewed the approaches taken by the provinces and municipalities of Canada.

We wish to extend our thanks to those who took the time to appear at hearings and make submissions with respect to conflict of interest matters; those officals who provided written information about the workings of conflict of interest rules for which they have particular responsibility; those from Crown corporations who responded to requests for information; those United States officials who were so co-operative; and those from the provinces and municipalities who sent information. A detailed listing of these individuals is contained in Schedule A.

The studies that have been done over the past 15 years, the works that have been prepared and the books that have been written by those specializing in this field were studied and analyzed. The history of the development of ethics in modern society was also considered.

Our approach and recommendations have been discussed with a number of people recognized as experts in this subject area, and we benefited in particular from the suggestions of Kenneth Kernaghan, Professor of Politics and Administration, Brock University; Robert Jackson, Professor of Political Science, Carleton University; Jeremy Williams, Professor of Law, University of Alberta; Roswell B. Perkins, who was Chairman of the New York City Bar Special Committee on Federal Government Service and Conflict of Interest; and Michael M. Harmon, Professor of Public Administration, George Washington University, Washington, D.C.

(f) Organization of This Report

In your letter to us, Prime Minister, you said that you intended to publish our report when it is submitted to you. For that reason, this report is presented in a form to facilitate public debate. It contains not only our analysis, recommendations and conclusions but also background and reference material, including an account of the history and development of the present federal conflict of interest laws and guidelines, a synopsis of those laws and guidelines, and a review of approaches to conflict of interest and standards of conduct in other jurisdictions.

As to terminology, we generally use the expression "public office holder" to mean anyone engaged in the federal public sector, or remunerated by the Crown in Right of Canada. In certain cases we use the term "non-elected public office holder" to refer to all of the above except ministers, parliamentary secretaries and ministers' exempt staff. These terms are more precisely defined in the draft Code of Ethical Conduct which appears in Chapter 12, part (d), of this report.

CHAPTER 2

THESIS AND THEORY

(a) Dual Themes: Integrity and Competence

Two consistent themes, of equal value, run throughout the work of the Task Force.

The first is that ethical conduct in the Canadian federal government must be beyond reproach. The second is that the federal government must be in a position to obtain the personnel it needs to meet the demands of contemporary government. Simply stated, the first theme involves integrity, the second, competence.

These two themes find expression in your letter to us, Prime Minister, when you observe, "It is essential that Canadians have trust in their government and its processes and in the calibre of individuals who commit themselves to public service. Nothing less than the quality of government in Canada is at stake."

The integrity of government is never a fixed condition, but a changing state which depends upon broad government programs, the attitude of those in the public service, the perception that government is addressing real needs of society and, of course, questions of conflict of interest. The integrity of government is an intangible quality, and at any given time some citizens may feel their government is acting with integrity while others might question it.

The operation of government in Canada is based largely on consensus, a willingness or tolerance to have the public sector carry out essential activities on behalf of society. For a society whose government is largely based on consensus rather than coercion, it is fundamental that the people retain their belief in the integrity of government. For their part, public office holders -- both elected and appointed officials -- must earn this confidence in their integrity, which is accomplished through countless actions day in and day out.

During the post-war years, there has been a gradual but substantial modification in the public's view of what standards of conduct are appropriate for government officials. The pace of

this change has accelerated in recent years. As Professor Kenneth Kernaghan has noted, this has been an important factor in disrupting the traditional pattern of response to instances of unethical behaviour.[1] Certain kinds of official conduct which used to be tolerated or mildly condemned now are considered unacceptable and punishable. This is especially the case in the area of conflicts of interest.

The seriousness of even a potential conflict of interest was recognized in a decision made in 1974 under the federal Public Service Staff Relations Act.[2] The adjudicator upheld the suspension of a federal employee who established a company offering services which could lead to a conflict of interest with his official duties. The Board found that the appearance of conflict was enough to establish a conflict of interest. According to the adjudicator,

> It is not sufficient for the public servant or his associates to be convinced of their own innocence and integrity. Nor is it necessary to prove that they have been disloyal to the employer. Even in the absence of evidence of wilful wrongdoing, a conflict of interest or the appearance thereof can be easily recognized by an intelligent citizen as contrary to public policy.[3]

Reflecting on this high level of public life, where even the appearance of a conflict can be held to constitute a conflict of interest situation, we find it significant that contemporary Canadian society shows itself keenly aware of the conflict of interest problem. We agree that,

> In a sense, conflict of interest is a luxury issue -- a matter that only an otherwise secure and established society

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1. Kenneth Kernaghan, Ethical Conduct: Guidelines for Government Employees, (Toronto): Institute of Public Administration of Canada, 1975), p. 4.

2. Public Service Staff Relations Act Decision, Between Maurice Dudley Atkins, Grievor, and Treasury Board (Ministry of Transport), Employer. March 21, 1974. File: 166-2-889.

3. Ibid., p. 30.

> can afford to worry about. Only when grosser larcenies in government have been reduced to tolerable limits -- only when overt venality is uncommon enough to shock -- is it possible for a government to concentrate on potential for evil and to try to head off corruption at its sources.[4]

Yet to what extent is this luxury to be indulged? The Wall Street Journal, on July 15, 1983, reviewed several current cases involving ethical issues on the United States political scene, and in an editorial entitled "Ethicsgate", suggested the matter was getting out of hand:

> At some point the untrammelled pursuit of virtue becomes irresponsible, even if it is not tinged with hypocrisy, as it so often is. This is something we need to think about -- we as a society: political adversaries, voters, book publishers, book buyers, news reporters, newspaper readers and television viewers. We have developed the habit of unleashing moral absolutism to devour anyone who reaches the public spotlight. Then we wonder why the best men and women are not found in public life, why those you do find there are often curious personalities with a moth-like attraction to the flame.

On our side of the border, this same concern that "the untrammelled pursuit of virtue" is becoming irresponsible has also been voiced. We received several submissions to the effect that irresponsible "investigative journalism" has detracted from the integrity of government in cases where this was unwarranted. Moreover, we were told that overreaction to conflict of interest and potential conflict of interest problems has made public service far less attractive. As a result, there has been some difficulty in recruiting people from the private sector.

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4. Conflict of Interest and Federal Service, Report of the Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws (Cambridge, Mass.: Harvard University Press, 1960), p. 6.

Nevertheless, the fundamental importance of the media in "keeping government honest" is recognized. Here again a "dual" theme is encountered: irresponsible journalism can do great and irreparable harm. As someone has said to a journalist "It's your story, but it's my life!". Reporters who are careless with facts or conclusions in this area may do more harm than good. Yet at the same time, our concerns about "conflict of interest" might be largely absent if it were not for the media which bring matters to public attention, and heat them up to a point where action is required to rectify the problem and shore up public confidence in government. The media cannot afford to be any less mindful of the importance of integrity in government, and the need to maintain that integrity when and where it is warranted, than the others.

Turning to the theme of "competence", government in the latter part of the twentieth century has grown to unprecedented size and complexity. While some argue that it is unnecessary to have so large a public sector, and that government need not be as engaged in regulation or so active a participant in business activities, the reality which we must deal with is that the federal public service[5] consists of some 234,866 employees (as of December 31, 1983) operating through some 27 departments of government and some 79 boards, agencies, tribunals, commissions and other organizations. In addition, 78 Crown corporations employ more than 250,000 people and the Canadian Armed Forces and uniformed personnel of the RCMP account for a further 100,000.

What is important is the enormous amount of government activity and the thorough-going system of government regulations and controls we have in Canada. At the same time, principally through the instrumentality of Crown corporations but in other ways as well, government has become a major player in the economy. These two developments point to an obvious source of conflict of interest. These activities are carried out not by robots or computers, but by human beings who, though in the public service, have other interests, relatives, friends, and ambitions.

Quite apart from the fact that increased government activity may generate additional conflict of interest problems, this expanded role of the state raises another important human dimension: to be competent, government must be able to attract the best and brightest from outside government, and must be able to adapt techniques and procedures which may not, until now, have

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5. Departments and agencies listed in Schedule 1, Part 1 of the Public Service Staff Relations Act.

been considered part of the traditional role or approach of government.

The government has found increasingly that it can supplement its personnel needs by going "outside" for talent. As a result, government has developed new techniques for enlisting the services of individuals outside the public service. Intermittent and quasi-employment arrangements have become widespread for consultants, part-time experts, advisers with or without compensation, advisory committees, and independent contractors who do studies or consult.

It is at this point that the dual themes -- integrity and competence -- intersect. The relation between controls on conflicts of interest and government staffing is most evident where the demand for trained talent is strongest. A society may find itself with only one individual or firm qualified to design or supervise the development of a particular item of high technology. When matters arise involving that technology, the government has little choice but to turn to this one expert person or company for guidance, regardless of what their personal economic activities or affiliations may be.[6] The issue of the shortage in certain areas of qualified or expert personnel was identified, for example, by Mr. Justice Hyde who expressly recognized that the shortage of labour economists made it likely that the government and the private sector would draw upon the same small talented pool for advice and consultation. In this context, it has been noted, "Vigorous enforcement of conflict of interest restrictions implies either the availability of alternative experts equally capable, or a deliberate choice to get along with the less capable. Most nations do not have the first and are unwilling to risk the second."[7]

It should be noted that a reason for the concern about ethical conduct is that there is, at present a poor public image of politicians, and public office holders generally. Allegations against a few or appearances of unethical conduct by some officials give support for the exaggerated view that all are corrupt. Thus we come to the question of whether existing restraints on conflicts of interest are adding substantially to the difficulties of operating contemporary government. Are present restrictions, aimed at the worthy goal of higher ethics, undercutting the government's efforts to attract needed talent?

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6. R.V. Picard (1967), 65 D.L.R. (2d)658.

7. Conflict of Interest and Federal Service, op. cit., p.9.

The particular obstacle in attracting competent individuals into public service is the problem caused by those portions of the conflict of interest rules requiring divestment of personal investments and the giving up of other rights. While competent men and women may be willing to accept lower pay in public service they are becoming increasingly reluctant to divest themselves of their lifetime accumulations of investments and other rights of private industry and life. The evidence indicates that these divestment requirements have caused significant financial loss or hardship in a number of cases and that they are objectionable in the sense that such rules are perceived to be based on the premise that people are inherently unethical and cannot be trusted. Several people argued that this premise is faulty, because it automatically assumes that if individuals coming into public service retain any of their private interests or connections of a business nature, they will be unable to differentiate between the public interest and their private interest. On the contrary, where the holding of an office does not involve participation in the economic portfolios of government, or in the regulation of the commercial, mining or manufacturing sector of the Canadian economy, it should be recognized that there is substantial benefit to be derived from involvement in outside activity that maintains and stimulates an interest in the private sector.

Existing conflict of interest restraints have tended to hamper the recruiting of individuals to serve in senior government positions, and have likewise been a barrier encountered by political parties seeking candidates to run for public office. The country is currently in the midst of "fall-out" from this phenomenon. A number of people recruited into public office did not know until after they assumed these positions how extensive the rules are regarding divestment of assets and in some cases that there were guidelines. Some might not have taken on public duties if the rigour of the régime had been known in advance. Considerable time and effort, including administrative effort, are involved in having senior officials -- primarily those appointed by the Governor-in-Council -- make detailed reports and divest themselves of assets which could have little or no bearing on their official duties, or vice versa.

Certainly, private interest must never imperil or jeopardize public business, and in appropriate circumstances, confidential or public disclosure is highly beneficial and effective in achieving this goal. Yet we must not lose sight of the fact that rights of privacy are involved and must be weighed in the balance.

From those who have suffered under the existing rules, word is now trickling down to others in the private sector of the difficulties to be expected. As a result, the recruiting problems

for the federal government are likely to be more serious in the years ahead than they have been in the past. This can only be changed, in our view, by developing a greater measure of reasonableness in the rules, and establishing a clear-cut method for determining when and where rigid enforcement of rules may comply with the letter, but no longer the spirit, of the law, and thus become counter-productive.

Whatever the remedies may be to enhance recruitment, and thereby public sector competence, it must be remembered that neither of the dual aims can be safely subordinated to the other. The recruitment remedies cannot be allowed to undermine public protection against unethical practices in government.

We agree that,

> The risk from inadequate staffing is immediate; the risk of corruption and loss of public confidence in governmental integrity is longer range. Neither risk can be tolerated. What is needed is balance in the pursuit of two objectives. The national interest demands an integrated policy for the long and for the short run. We need a policy that neither sacrifices integrity for opportunism nor drowns practical staffing needs in moralism. We need a careful regulatory scheme that restrains official conflicts of interest without creating pernicious side effects."[8]

It is our belief that such a balanced system can be established along the lines recommended in this report.

(b) Sole Focus: Standard of One's Conduct

The term "conflict of interest", which is an expression of relatively recent origin, is perhaps too limited or narrow a concept to embrace adequately the concern expressed in our mandate. Indeed, although we have from the outset been described as the "Task Force on Conflict of Interest", your letter to us, Prime Minister, does not use this expression, and our Terms of Reference only use the expression in reference to the current conflict of interest guidelines. The term used throughout is

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8. Conflict of Interest and Federal Service, op. cit., p. 10-11.

"conduct". The single focus for examining these questions is the standard of one's conduct. By this, of course, is meant ethical conduct.

Some would devise government policy in this area by looking at a narrow range of conflicts; indeed some would define it in economic terms only. It is more positive and constructive to come to this subject with a broader, all-encompassing notion that we are really dealing with ethics, regardless of the situation or context within which a "conflict of interest" arises. Legal régimes and government policies in other jurisdictions which seek to focus too exclusively on conflict of interest, and thus end up defining in great detail the various instances in which particular conflicts might occur, seem, in their effort to define and particularize, to have lost sight of the main idea, which is that one should be ethical in conducting public business. This means, by Canadian ethical standards, that where a private interest intersects with the public interest, the conflict must be resolved in the public interest -- whether by resignation, divestment of assets, disclosure, disqualification from handling the matter, or other means.

In an earlier time, when, for example, the co-chairmen of this Task Force entered politics, the public was more prepared to give the benefit of the doubt to a minister or public official. In other words, there was confidence that such officials would give precedence to their public duties over their private interests. This is no longer so. The public has come to expect positive measures designed to remove or minimize the conflict of interests. This is now another component, therefore, of the main "idea": ethical conduct should be reinforced by rules.

This is not to presume that conflicts of interest will not arise; we cannot imagine the limited and circumscribed life one would have to lead never to be in a conflict situation. The real issue is how conflicts are resolved when they do arise. In some cases, we recommend that current policy continue to apply, whereby certain public office holders (such as Cabinet ministers) must divest themselves of certain properties and affiliations in order to hold office; this is simply "preventive medicine" since it eliminates in advance the types of conflicts that are inevitable and predictable for Cabinet ministers in modern government. In the other cases, however, where the problem cannot be foretold and removed in an anticipatory fashion, it is necessary to fall back on ethical principles to guide individuals out of their conflict of interest dilemma. To assist in this process, it is important to state with simplicity and certainty rules of ethical conduct, which we propose be stated in an Act of Parliament.

These rules can perhaps be boiled down to a single precept, although it may be too pithy to find its way into an Act of Parliament: "Don't do anything you would be embarrassed to read about in tomorrow's newspaper". This counsel is a relevant guidepost for many people.

"Ethics" is a word derived ultimately from the Greek word "ethos", meaning character. It has come to refer to "a set of moral principles or values", but it may be thought of as something much more penetrating than a moral code. It refers to the very essence of one's character -- one's integrity, the intangible part of us motivating us to be and do the same when people are not watching as when they are.

The ultimate answer to ethical problems in government is to have honest people working in a good ethical environment. No web of statute or regulation, however intricately conceived, can hope to deal with the myriad possible challenges to a person's integrity or his or her devotion to the public interest. Nevertheless, formal regulation is required -- regulation which can lay down a clear statement of policy, punish venality and double-dealing, and set a general ethical tone for the conduct of public business.

(c) Policy Objectives and Underlying Principles for Standards of Conduct

In focussing on standards of conduct, at least seven policy objectives and underlying principles are involved:

1) impartiality, fairness and equality of treatment toward those dealing with government;

2) assurance that decisions of public importance will not be influenced by private considerations;

3) efficiency and economy in carrying on the business of government;

4) maintenance of public confidence in government (including the matter of appearances);

5) prevention of the use of public office for personal advantage, directly or indirectly;

6) encouragement of a positive and professional attitude towards government service; and

7) facilitation of movement of individuals between the public and private sectors.[9]

(d) Three Touchstones for Evaluating Standards of Conduct Rules and Procedures

One of the characteristics of the current guidelines and statutory provisions dealing with conflict of interest at the federal level is their disorder. Policies have been developed, by and large, as sporadic responses to particular evils. A patchwork quilt of rules and procedures has resulted, each component of which may be quite understandable and logical, but which, taken together, have resulted in a system which is unnecessarily complex, in many cases unfair, and in some instances unreasonable.

Based on this assessment as touchstones for evaluating standard of conduct rules and procedures, and in particular for devising a new system to replace the one presently in operation, we would continuously ask three questions about any rules or procedures, either existing or proposed: "Are they simple? Are they fair? Are they reasonable?" These concepts of simplicity, fairness and reasonableness each require elaboration.

Simplicity. Some of the best rules for ethical conduct (such as the Golden Rule: "Do unto others as you would have them do unto you."), are those stated precisely and simply.

There is no evidence that greater detail and precision in drafting such rules in fact contributes to more ethical behaviour; indeed, a case to the contrary can be made. It appears that there will always be a small group of individuals who are intent on cutting corners, serving their selfish ends, and breaking the law. Presenting such individuals with a complex thicket of laws and procedures offers them places to hide or loopholes through which they can escape.

In short, the urge to write complex rules to govern ethical behaviour is counter-productive in two ways: it does not provide an adequate check against those intent on breaking the rules, and it mitigates against effective education of those coming into the public service about the rules which govern conduct. The simpler the rules, the more readily they are understood, and the less scope they give for evasion.

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9. See Roswell B. Perkins, "The New Federal Conflict of Interest Law", Harvard Law Review, 76, No. 6 (April 1963), p.1118.

Guidelines currently in force dealing with conflict of interest include the supplemental codes written at different times by different people for the departments, agencies, and Crown corporations listed in Schedule B of this report. Taken as a whole, the present system is unnecessarily complex. Not only is there an intimidating volume of material, but definitions and expressions are not always consistent from one code to another. Certainly the procedures seem to be susceptible to considerable simplification.

Fairness. The present conflict of interest guidelines are unfair it seems to us in two ways, namely in the nature of the express provisions which exist and in the nature of the procedure which is followed.

When the generally applicable conflict of interest guidelines were promulgated for the public service in 1973, Treasury Board invited individual departments, boards and agencies to develop supplemental codes where considered appropriate. A number were developed subsequently, but this has not been done in all cases. The result is that two public office holders in roughly similar positions in different departments may be subject to different rules: one, to only those rules of general application in the 1973 guidelines, and the other, to both those 1973 rules and the further rules developed within the department. It seems unfair that two public office holders in similar positions should be so treated. There remains the problem of punishing those who contravene the guidelines. Even if all codes were identical, deputy ministers and heads of agencies would still have the authority to discipline offenders as they saw fit. It would be very difficult, and quite inappropriate, to establish levels of discipline to be applied to classes of cases. In keeping with the functional approach advocated throughout this report, it is considered that appropriate sanctions are best decided by the deputy minister or agency head concerned or his or her delegated representative. This theme is somewhat parallel to the judicial system, where, although consistency of penalties is an objective, there will always be some deviation from case to case which will cause a different judgement to be rendered.

As to procedural matters, even in departments where the rules (as expressed in supplemental codes) are essentially the same, the deputy minister of one department may favour strict vigilance in this area of ethical conduct, while a deputy minister in another department may be comparatively indifferent to the subject and delegate his responsibility for such matters. This can mean that a similar problem arising in two different departments will be treated on a different basis in each. Government policy must be administered through individuals and this human dimension will inevitably generate differences both in interpretation and enforcement. It is also recognized that

matters of discipline and related enforcement of conflict of interest rules must largely be left in the hands of the deputy minister or head of agency concerned. However, we wish to point out the inherent, yet inevitable, unfairness of having similar rules applied differently in different departments of the same government.

Our recommendation is that such matters continue to be the administrative responsibility of the deputy minister (or head of commission or agency) but that, in order to move closer to administrative fairness, procedures recommended later in this report could help even out discrepancies which appear to exist when current practices in some departments are compared with others.

Reasonableness. The real test of a law is not how it is stated in the abstract, but how it is applied in particular situations. We have heard considerable evidence, from a wide range of individuals subject to the current conflict of interest guidelines, that the general principles or rules contained in the guidelines may sound fine, but in specific applications they often have unintended, even harsh and mean, results.

No reader of this report should jump quickly to the conclusion that we have heard from dishonest people who would prefer not to be brought to justice, given a choice in the matter. On the contrary, many public officials of high reputation and unchallenged integrity have found that the enforcement of the letter of the law is increasingly destructive of what must be the intended spirit of the law in this area.

Three examples follow:

- Under a rule which stipulates that a public official must not own shares of companies in the communications field, a public office holder was required to divest herself of ten Bell Canada shares. To accomplish this, a trust was established, for the purpose of holding these shares and the cost of setting up the trust exceeded the value of the shares. The employee could have sold them and would have done so except for their sentimental value. In light of the fact that some two hundred million shares of Bell Canada are held by the Canadian public, it seems inconceivable that holding only 10 shares would influence the employee in a way that would subvert any public interest. Yet the rule had to be enforced in a way which all parties concerned, including the officials enforcing it, considered unreasonable. The problem, obviously, is the absence of a de minimis rule which would allow officials administering the guidelines to decide, in a particular

case, that a matter was inconsequential and would therefore not be subject to the requirements of the guidelines.

If these officials had discretionary power to resolve these de minimis matters, it would be sufficient to indicate to the employee in writing that continuing to hold a few shares would not offend the spirit of the guidelines, but that she should report any subsequent changes in her shareholdings.

- Another case involved a Governor-in-Council appointee who encountered problems because he was not permitted to engage in certain types of financial activity. Some years prior to his first appointment by Order-in-Council his father died leaving a modest estate under which his mother received a life interest in income with the capital to be divided among the public office holder and his two brothers on the mother's death. At a time when "estate splitting" had greater advantages than it now has, his father had transferred assets to the mother's name so that a capital amount equivalent to the capital value of the estate was held in the name of the mother. On the mother's death, barring a change in the established arrangements, her estate would pass to the public office holder's two brothers and himself.

  For administrative purposes, these assets were treated as a single fund. The official, his mother and his brothers were trustees of the father's estate and all were interested in the administration of the total fund. The assets comprising the fund were administered under a management contract by a major Canadian investment firm given absolute discretion under the investment guidelines that formed part of the contract. The official and his brothers met annually with a representative of the investment firm to review performance, to discuss the investment guidelines and, where appropriate, to revise them and examine the outlook for the forthcoming year.

  This information was disclosed as required to the Assistant Deputy Registrar General responsible for administering the guidelines and it was indicated that he had to refrain from managing stocks, shares or securities of public corporations or ".... giving advice to others concerning such assets". He was advised not to take part in discussions with the firm regarding investment policy or cancellation of the contract should the firm's performance be unsatisfactory (in the context of dealing with publicly traded shares).

The estate, with his mother's investments, had a total value of substantially under $1 million. Investments were in shares or securities of publicly traded corporations and the portfolio was well balanced so that the interest in any corporation was miniscule. His mother had no business experience so it was logical that he and his brothers, as co-trustees and residuary beneficiaries, should take at least a limited interest in the effective management of the fund.

The present guidelines, concludes this individual, do not provide adequate scope for common sense and good judgement being taken into account by public office holders in the analysis of potential conflict situations. Nor do they recognize that normal family obligations and interests might be excluded from the routine restrictions.

To cover the circumstances outlined in this second example, it again seems reasonable to apply a de minimis rule, which could be "staged" for different levels or financial amounts involved. It could be applied so as to allow for direct holdings and participation in management up to a stated limit that could be indexed and would allow for the kind of interest and involvement this official had, where major management responsibility rests with a professional manager under a written contract. Stipulations regarding abuse of information obtained in the course of public service employment could be written into the arrangement.

- A third example involves a Governor-in-Council appointee, who also encountered an experience involving his personal responsibility to manage a family estate. What he found most exasperating was the extensive amount of "red tape" involved -- the time that had to be spent with representatives of the Assistant Deputy Registrar General, and the thick file of correspondence built up over trivial matters because the administrators of the guidelines had no discretionary power to rule on de minimus matters.

We do not wish to conclude on the suggestion that unreasonableness is the stock-in-trade of the Assistant Deputy Registary General; we have been made aware of cases where just the opposite is the case, with those subject to the guidelines praising the ADRG's flexibility and reasonableness to meet the spirit of the rules. Our point is not that there is a problem with the ADRG, but with some aspects of the guidelines he has been called upon to administer.

(e) The Nature of a Conflict of Interest

When the private interests of an individual are at variance with his or her official duties and responsibilities to the government, a conflict of interest exists. It is this point of interference or intersection between competing interests that requires analysis.

In extreme cases, the private interest can involve a criminal motive, and would result in cases where the individual seeks to use a position in government, or confidential information received in government, in a fashion proscribed by law. This is in the realm of Criminal Code provisions which address undue influence, bribery and corruption of public officials. Even though the initiative to bribe or corrupt comes from someone outside the public sector, it can only succeed when a public employee or official succumbs to the overture and participates in an unlawful act, which normally requires criminal intent on the part of the employee or official.

Moving along a continuum, away somewhat from these extreme cases involving criminal intent, another category of offences -- also dealt with in the Criminal Code -- concerns acceptance of a gift by a public official. Acceptance of the gift may be considered in law to be a conflict of interest even in the absence of corrupt intent. The act of accepting a gift or inducement is sufficient to constitute the offence, since it is seen as the basis for interference with the public interest on the grounds of privately received consideration.

Further along this same continuum, are interactions between public and private interests which are not criminal but where private economic or other interests of the government employee or official come together with official duties which he or she must perform.

Private and public interests need not be in competition or conflict for an ethical problem to exist; the public interest could be abused equally where private interests of an office holder coincide with the public interest so as to mesh together, with the result that in serving the public purpose the individual benefits privately as well. While one cannot condemn such arrangements in the abstract, "conflict of interest" can in some cases mean "compatibility of interest". Particularly in cases where economic interests are involved, there is a risk that more is taking place in the discharge of a public function than may meet the eye.

Moving further along this continuum on which public and private interests intersect, we come finally to the opposite extreme from the conflicts involving criminal intent -- to those

situations where all that is involved is the appearance of a conflict. This is the most nebulous of areas, although it, too, has become the subject of laws. For instance, there are statutory provisions which prohibit participation by public servants in political activities, since this would appear to impair their subsequent ability to carry out official business. As well, there are rulings such as the Public Service Staff Relations Act decision, between Atkins and Treasury Board in 1974, which recognized the seriousness of even a potential conflict of interest, when a federal employee who established a company offering services which could lead to a conflict of interest with his official duties was suspended, a suspension which the adjudicator upheld. Finally, there is policy as embodied in provisions such as the original conflict of interest guidelines contained in Order-in-Council PC 1973-4065 which stipulates that a public servant must act, and appear to act, in the public interest in the discharge of his or her duties.

Beyond this spectrum of conflicts of interest lies a range of activities which would be considered unethical, whether practised by public office holders or anyone else. On the other hand, some actions which fall within the broad band of conflict of interest regulations as they currently exist, do not seem immoral or improper in a personal or subjective sense.

In this wide field of ethics and human conduct, our interest is limited to the permanent and endemic problem of all governments -- the continuing problem posed by the clash between the personal and public lives of officials. Some of the experts who have written on the subject of conflict of interest in government have chosen to restrict the topic to conflicts between a public office holder's duties and his or her personal economic interests. Yet people are driven by many motivations, by no means exclusively economic in nature, and we prefer to take a broader view in considering conflict of interest. We do not try to itemize all the particular types of private interests (such as economic, family, religious, partisan, corporate, institutional, ethnic, sexual and so forth) which may motivate individuals, believing it wiser to focus on ethical conduct in situations where public interests and private interests (of whatever nature they may be) intersect.

Still, some limits are appropriate in defining "conflict of interest". For example, the House of Commons Standing Committee on Public Accounts[10], in dealing with Canadair last

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10. Twenty-Second Report (The Canadair Report) of the House of Commons Standing Committee on Public Accounts, tabled November 17, 1983, p.2.

November, has drawn attention to the problem of "conflict of duties" in these terms:

> Your Committee has serious concerns about the significant part played by the shareholder's representatives both as directors on the board of the company and as public servants advising the Minister. This resulted in a conflict of duties, whereby:
>
> (i) as directors, these public servants were instructed to represent their Minister's views; and
>
> (ii) also, on behalf of the board, they were called upon to influence department officials to provide financial assistance to the company.
>
> This conflict of duties, in your Committee's view, substantially weakened the objectivity of the board and its accountability to the shareholder. In addition, as government representatives, they may have had a disproportionate influence on the decisions made by the board of directors.

While this "conflict of duties" is a significant problem, it is excluded from the definition of "conflict of interest" because we feel it does not pertain to ethical conduct but rather to structural arrangements whereby some individuals in Crown corporations are called upon to serve two masters. The test of "reasonableness" has been chosen carefully and the term "flexibility" was rejected in this context. To state that conflict of interest rules should be "flexible" would be to invite distrust from members of the public who would see this as a formula for bending the rules where necessary to suit friends of the government, or for purposes of "administrative convenience" within the public service which is not what is intended. Our aim is to see that the rules which exist can be applied in such a fashion that all concerned -- the parties directly involved, and members of the general public -- can be satisfied as to the probity of the situation.

If well-intentioned men and women of integrity in the public sector find that the rules, in their application, are so unreasonable as to suggest "the law is an ass", they might have little compunction about breaking those rules. In fact, the irony is that these people of integrity could feel justified in circumventing the rules by failing to disclose certain information, or failing to divest of certain interests. In short,

there is a tolerance level beyond which one cannot push rules of this kind without the entire exercise becoming counter-productive. This is particularly so in dealing with a large number of public-spirited individuals who are trying their best to fulfil their public duties and live in concert with their many different personal and private interests. We seek to resolve this dilemma by ensuring that the rules -- particularly the procedures followed to minimize conflict of interest -- are reasonable.

CHAPTER 3

IMPROPER FORMS OF CONDUCT FOR THOSE IN GOVERNMENT SERVICE

(a) The Need for a Clear Statement of Prohibited Activity

Because we have chosen to cast this subject in terms of ethical conduct on the part of those in public service, it is necessary to address the kinds of activities and forms of conduct which we consider unethical. It is not sufficient to state simply that one should act ethically; there must, as well, be a short and succinct statement of prohibited activity. People must know the outer bounds of permitted activity, so they can govern themselves accordingly.

We have already expressed deep concern about trying to write rules too specifically, both because of the problems this creates for educating public servants as to the nature of the rules and the difficulty of trying to envisage in advance and provide for every particular type of improper conduct that the human mind is capable of devising.

Accordingly these types or categories of improper conduct are stated in general terms, so that they are applicable to all kinds of problems that might arise. At the same time, the simplicity of these rules can make them meaningful in any particular case. The approach followed was described by Secretary of the Treasury Board, G.F. Osbaldeston, in the Treasury Board Circular of December 31, 1973, to deputy ministers and heads of agencies on the subject of standards of conduct for public service employees. Mr. Osbaldeston stated:

> In developing any guidelines, the first question to be faced was how comprehensive and detailed they should be and whether much detail would help employees to identify potential areas of conflict. It is believed that a detailed set of guidelines in the Order-in-Council would be neither appropriate nor desirable. Any attempt to identify the totality of potential areas of conflict would be a task of great magnitude, could never be totally

comprehensive and would require constant review and interpretation. Instead a more workable approach has been taken to identify certain principles, the violation of which would clearly establish a situation of conflict of interest. With these published principles, the overall intent is established and actual situations can be scrutinized to determine whether the principles are respected.

(b) Nine Forms of Unethical Conduct

Of the nine forms of conduct described below, the first six (self-dealing by a public office holder, discretionary transfer of economic value to a public office holder from a private source, assistance by public office holders to private parties dealing with government, post-employment assistance by former public office holders to private parties dealing with government, private gains derived from information acquired in an official capacity, and private use of government property) we consider to be unethical conduct.

The last three forms of conduct (partisan political activity by a non-elected public office holder, criticism of government policy, and conduct unbecoming to one's public position) while not in the same realm of ethics, are, in our view, improper forms of conduct for those in the public service.

Partisan political activity, criticism of government policy and matters of personal conduct can lead to conflicts of interest, in the sense that one's personal or private views and practices can become entangled inappropriately in the discharge of one's official public duties.

A detailed discussion follows of each of these nine forms of unethical or improper conduct.

1. Self-Dealing by a Public Office Holder

We consider it to be clearly unacceptable and unethical conduct for a public office holder to take some action, in his or her public capacity, which involves dealing with himself or herself simultaneously in his or her private capacity.

This situation would arise most typically where the public office holder is involved in the awarding of a contract to a company which he or she owns in whole or in part. Another example would involve a government scientist or other expert consulting to the government who develops specifications for a

highly specialized piece of equipment which can actually be produced most expediently by his or her own company.

As the concept is currently applied to Cabinet ministers, the Guidelines for Ministers of the Crown stipulate a number of prohibited activities which preclude any form of dealing by the minister with himself or herself in a personal capacity. For example, ministers upon appointment must cease to engage in the practice of a profession or in the management or operation of any business or commercial activity, or in the management of assets except exempt or discloseable assets. They must cease to serve as paid consultants. They cannot retain or accept directorships, or offices in commercial operations, nor can they serve any longer as active members in unions or professional associations.

The principle here, in its broadest application, is as follows:

> Public office holders must not have personal interests which would be affected particularly or significantly by government actions in which they participate.

2. Discretionary Transfer of Economic Value to a Public Office Holder From a Private Source

We have had extensive discussions concerning the acceptance of gifts, money, and other benefits, and have noted, sometimes with consternation, the efforts made elsewhere to delineate and protect against the many different ways in which attempts may be made to suborn public office holders. The possibilities are limited only by one's imagination, and run the gamut from meals to entertainment, gifts, travel, weekends at a hunting or fishing lodge, "sweetheart" arrangements on loans and so forth.

The concept of the "discretionary transfer of economic value" encompasses, in a single expression, all of these possibilities. In this context, we are referring to the discretionary (as distinct from non-discretionary such as pension benefits or royalty payments) transfer of economic value from a private source to a public office holders. In its most offensive form, this transfer of value can constitute bribery, in which case the Criminal Code governs.

The essence of bribery, as noted by Roswell B. Perkins, is its quid pro quo aspect with the "quo" having to do with conduct in office: something of value is given in return for an express or tacit undertaking on the part of the public office

holders to help bring about certain governmental action or inaction.[1] The comprehensive bribery provisions in the Criminal Code are essential to complement an effective structure for dealing with conflict of interest problems, although the conflict of interest principle considered here addresses behaviour short of bribery. In fact, the transfer of economic value to a public office holder may involve no criminal intent, and may be done with the most laudable of motives. The obvious problem is, however, that regardless of the donor's intent, the result of accepting such transfers can involve a range of responses by the public office holder from gratitude to economic dependence and can jeopardize the recipient's ability thereafter to deal impartially, fairly and equally with such donors.

The discretionary transfer of economic value to a public office holder from a private source is most commonly referred to in the existing guidelines as a "gift". For instance, ministers are required to disclose in the Public Registry "any personal gift or other benefit of a value exceeding $200 which they receive from any person not connected with them by blood relationship, marriage or adoption, together with the name and address of the donor." Official gifts and hospitality received from other governments and hospitality received from personal friends are not subject to this rule. All gifts or benefits exceeding $200 in value, other than official gifts or benefits, are to be declared to the Assistant Deputy Registrar General within 30 days of their receipt for disclosure in the Public Registry.

The Public Servants' Guidelines do not directly deal with gifts, nor do Governor-in-Council Guidelines. There is no provision on the subject of gifts in the Public Service Employment Act. However, in the December 31, 1973 Treasury Board Circular to deputy ministers and heads of agencies on the subject of standards of conduct for public servants, it was stated that the acceptance by public servants from persons having dealings with the government of sporadic or casual benefits such as hospitality or small gift items may usually be consented to by deputy ministers or branch heads "where such benefits or advantages are within the bounds of propriety, or a normal expression of business courtesy or advertising or are within the normal standards of hospitality and are not such as to bring suspicion upon the public servants' objectivity."

This general provision was subsequently elaborated upon, most recently in an amendment to the Personnel Management Manual

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1. Perkins, op. cit., p. 1119.

of Treasury Board. The latest policy statement was issued November 24, 1983 to clarify government policy regarding the acceptance by public servants of benefits, advantages, fees, honoraria or favours which are offered by third parties, particularly where the provision of free or reduced transportation fares, and fees or honoraria for speeches or similar activities are involved.

As a result of this policy revision the rules[2] now read:

> Public servants are prohibited from accepting benefits, advantages, fees, honoraria or favours arising out of activities associated with their official capacity, or the performance of their duties, which are offered by third parties. Such acceptance could not only compromise the position of the employee and the department but, under certain circumstances, could constitute an offence under the Criminal Code. However, the acceptance by public servants from persons having dealings with the government of sporadic or casual benefits such as hospitality or small gift items may usually be consented to by deputy heads, where such benefits or advantages are a normal expression of business courtesy or advertising, or are within the normal standards of hospitality, and are not such as to bring suspicion upon the public servant's objectivity. The acceptance of any gift should be confined to promotional items of nominal value. The degree of hospitality accepted should be limited to the degree that existing authorities permit the extension of similar hospitality at government expense.

This policy is then elaborated upon as follows:

> Gifts or offers of hospitality not covered above should be declined. Gifts

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2. As contained in Volume 1 of the Personnel Management Manual, Chapter 3, Section 5.5.

should be returned with a letter of appreciation explaining the departmental policy. Perishable gifts could be sent to a charitable organization and the donor informed. Where a department pays the travelling expenses of an employee who undertakes in his or her official capacity to address a meeting (or participate in similar functions) of a group or organization and the employee receives a fee or honorarium for such services from the group or organization involved, the employee must report it to the department and return the fee or honorarium to the group or organization. However, if it is not possible to decline or return such fee or honorarium, or if such action is likely to be construed as being discourteous, the employee must either reimburse the department for the travelling expenses paid by the department or remit the fee or honorarium to the Crown.

Public servants should also be cautioned against acceptance of advantages or favours such as free or reduced transportation fares or accommodation for themselves or their families. In addition, the travel industry, from time to time, engages in promotional activities ranging from credit vouchers exchangeable for services at various hotels, to discount coupons applicable to future flights. Since the employer is responsible for transportation and other costs related to travel on official government business, any vouchers and coupons resulting from such travel are the property of the Crown and must be submitted by the employee with the travel claim.

Nevertheless, where the explicit duties of a position require an employee to board and travel on a particular commercial vehicle (e.g. air inspectors) and industry practice is to provide free travel for this purpose, the employee may accept, provided that such acceptance has been authorized in advance by senior departmental

> officials. In such cases, free passes which could also convey a personal benefit are not to be accepted or used. Instead, departments should request commercial carriers to provide identity cards which specify that passage is solely for inspection/regulatory purposes.

Underlying these provisions are provisions such as Section 110(1)(c) of the Criminal Code, which makes it an offence for an official or employee of the government to demand, accept or offer (or agree to accept) from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through anyone for his benefit, unless he has the consent in writing of his deputy minister or head of agency. In this context, a "person" includes any individual, group, corporation or Crown corporation.

The principle, in its most abstract formulation, can be stated as follows:

> Public office holders must not accept or solicit transfers of economic value from private sources, even though no bribery is involved, if the transfer is at the discretion of the donor as distinct from being pursuant to an enforceable contract or property right of the public office holder.

3. Assistance by Public Office Holders to Private Parties Dealing with Government

The two types of conduct described above involve public office holders operating in their official capacity, but a third and different situation involves them acting in a private role, but doing so in a government forum or in relation to a matter involving the government.

Because the operations of government today are so widespread, it is conceivable, indeed likely, that many public office holders will have interest in a subject or activity wholly unrelated to his or her specific duties, but which nevertheless involves some dimension or aspect of the government of which he or she is a part. It seems to us unethical for a public office holder to undertake private activities in relation to government matters, no matter which of the countless functions of the federal government is involved.

It is clear that this concern applies to employees and officials in the public service, not to Cabinet ministers or parliamentary secretaries who, as elected representatives, perform

such interventions as part of their role in the political process (nor to certain members of a minister's exempt staff who perform this role on behalf of their minister nor ministers appointed from the Senate).

The principle here can be stated as follows:

> Non-elected public office holders must not, without prior approval of their superior, step out of their official roles to assist private entities or persons in their dealings with the government.

4. Post-employment Assistance by Former Public Office Holders to Private Parties Dealing with Government

This fourth form of conduct is closely related to that of public office holders assisting private parties dealing with government, except that in this case we are considering the position of former public office holders.

The "post-employment problem" -- that is, the scope of permitted activities for a public office holder who has left the public service -- is one of the most difficult questions we have had to grapple with in reviewing government policy. The complexity is not only in the realm of defining what constitutes unethical conduct, but also in translating generalized precepts into actual situations.

When public office holders leave government, they take with them two kinds of information: (1) general understanding and knowledge of the way government operates, its structures and personalities; and (2) specific confidential information about government policy or about entities regulated by the government. Our view is that the more knowledge of the first type that is carried to the private sector, the better. It is more efficient for government and the private sector to understand correctly how the other operates, and for the private sector to know the appropriate procedures to follow in dealing with government, and which officials to deal with on a particular matter.

The second type of information -- that which is sensitive or confidential -- is likely to become dated in a relatively short time. However, to the extent that it can give an unfair advantage to particular interests, we believe it is improper, and in some respects unethical, to transmit this information out of the government. Of course those who have been in government have taken an oath or affirmation of secrecy with respect to information acquired in the course of their work, and this is one factor to be taken into account. Another factor is that public office holders have a fiduciary duty to government, based on the public trust implicit in the office or position they

hold in the public sector, and this fiduciary duty arguably must be respected in the post-employment period.

Post-employment activity is examined in detail in Chapter 14, and we made a number of recommendations. For present purposes, the basic principle can be stated simply:

> Within certain narrow and stipulated limits of time and degree of connection with their former responsibilities, former public office holders should otherwise be free to assist private entities or persons in their dealings with government.

5. Private Gain Derived from Information Acquired in an Official Capacity

The type of information which public office holders take with them upon leaving public service has been discussed. We now turn to a different issue concerning the use of government information by those in the public service.

Representations were made by groups concerned about private use of government information. For example, we heard from employees of the Department of Transport, Aviation Safety Branch, in relation to the conflict that arises when, drawing upon information acquired in the course of investigating airplane and helicopter crashes and related aspects of aviation safety, they hire themselves out as consultants on their own time, or are called upon as expert witnesses in litigations arising out of airplane crashes. Likewise, we heard from the Meteorological Branch of the Department of Environment with respect to employees who, on their own time, broadcast weather reports and meteorological analysis on radio or television.

Another example would be an employee in the Department of Agriculture who uses statistics collected on crops, prior to their public release, to speculate on grain futures. While such speculation may not harm the government or cause detriment to any private party, it involves unethical conduct in relation to the general public, in the sense that the employee has used for private gain information acquired in an official capacity. This information belongs to the public and he or she should not be able to use it for private purposes until it has been generally released to the public, at which time all Canadians are in the same position as the public office holder to use it.

From the specific types of problems drawn to our attention, it appears that to draft anything more than a general rule against misuse of information may create more problems than it solves. We recommend later that supplemental codes of conduct

be continued in government departments and agencies which already have them, and that supplemental codes be established in those departments and agencies which do not have them. Within the framework of the general principle set forth below, detailed rules respecting use of public information should be left to specific departmental and agency regulations.

A rule governing use of government information must be written with two cautions clearly in mind. As stated by Roswell Perkins, "A prohibition against the misuse of information, as it applies to the individual, treads dangerously near the legitimate use of know-how and experience acquired in a Government post". On the other hand, as it relates to the public interest, "such a prohibition borders on curbing freedom of the press."[3]

The general principle in this area could be stated:

> Public office holders must not take personal advantage of information obtained in the course of their official duties until it has become generally available to the public.

6. Private Use of Government Property

The improper form of conduct just considered involves private gain derived from information acquired in one's official capacity, in other words, misuse of intellectual property. Here we consider misuse of all other forms of government property.

A range of services and facilities are placed at the disposal of those working in the public sector, in order to enable them to discharge their official functions properly. Public office holders have a positive duty to protect and conserve government property, including equipment, supplies, and other property entrusted or issued to them.

The present guidelines in their various forms only deal with such matters by inference, which has led to some problems for individuals trying to resolve conflicts and having a hard time discovering where the public interest lies. Some supplemental codes in departments deal with it; others do not.

While it is not always possible to segregate completely one's personal and public lives, the need for a clear and simple rule in this area is manifest to ensure public confidence that

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3. Perkins, op. cit., p. 1122.

private business is not being transacted at public expense, and in order to give better guidance to public office holders in some of the grey areas currently causing practical problems and difficulties in legal interpretation of the guidelines.

The principle here can be stated as follows:

> Public office holders must not directly or indirectly use, or allow the use of, government property of any kind, including property leased to the government, for anything other than officially approved activities.

7. Partisan Political Activity by a Non-Elected Public Office Holder

Any activity of a political nature which brings into question the professionalism of a public office holder would imply a conflict of interest situation. The conflict here is not of a financial or material nature, but rather in the nature of a breach of trust, calling into question the doctrine of a politically neutral and impartial public service. Such questioning may have the end result of rendering the person unable to carry out the job of a public office holder because of a public perception of bias.

It is essential that the advice which public office holders offer their superiors or ministers be as objective as possible, and proferred without regard to partisan considerations. Individual public servants, their superiors and their ministers must be confident that this advice has not been politically motivated. Each Canadian must be confident that public office holders who provide them services are impartial in the execution of their duties. This relationship of trust cannot be guaranteed merely by the passage of law; it is earned daily through their conduct. Not only must they be non-partisan, they must appear to be so.

Under the present régime, which we propose should remain unaltered, restrictions on political activity do not apply to ministers, parliamentary secretaries or ministers' exempt staff, but normally apply to public servants who are working in the offices of ministers.

Strict adherence to the traditional doctrine of political neutrality in a parliamentary system of government has certain requirements:

- politics and policy must be separated from administration;

- public servants must be appointed and promoted on the basis of merit rather than for partisan reasons;
- public servants must not engage in partisan political activities;
- public servants must not express publicly their personal views on government policies or administration;
- public servants must provide straightforward and objective advice to their political masters, in private and in confidence, and this anonymity must be respected by the politicians; and
- public servants must execute policy decisions loyally and zealously with due regard to the philosophy and programs of the government of the day and notwithstanding their personal opinions.

Professor Kenneth Kernaghan has pointed out that "some of the requisite conditions have never been met; others have been altered to keep pace with changing political, social and technological circumstances."[4] It is true that both politicians and public servants participate actively in policy development, with the result that the line between politics and administration has become increasingly indistinct.

A number of appointments, of course, are not made by the Public Service Commission, such as deputy ministers, some associate deputy ministers, heads and certain members of agencies, boards and commissions, ambassadors and ministerial exempt staff. The government has the authority to make these appointments on the appropriate basis as determined by law. Kernaghan observes that it is difficult to measure with precision the impact of these appointments on the status of political neutrality. "The appointment of such persons to public service posts without competitive examination and on grounds of partisanship violates the merit principle but not the merit system."[5]

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4. Kenneth Kernaghan, "Politics, Policy and Public Servants; Political Neutrality Revisited," Canadian Public Administration, 19, No. 3 (1976), p. 433.

5. Ibid., p. 445.

There are certain arguments for and against restrictions. It can, on the one hand, be argued that there is a need to protect and maintain the political impartiality of the public service, since employees engaging in political activities would at least undermine public confidence in its impartiality by placing themselves in circumstances that would develop loyalties to a political party at the expense of their loyalty to their minister and the government. Also, the employee could face conflict of interest situations where the objectives of the government and those of his or her political party are in conflict. Strong party affiliations could also place employees in situations where they may feel a desire to influence decisions improperly on the basis of political patronage, such as in employment matters or the awarding of contracts. Finally, there is the view that, where restrictions on partisan activity by public servants do exist, they result in a climate which is more likely to engender an attitude of professional neutrality and impartiality.

On the other hand, one could observe that the political neutrality and impartiality of a public service has never prevented governments from using their administrative machinery for partisan purposes, nor has it prevented public office holders from aspiring to political office or holding private political views. Both of these factors could erode the political neutrality and impartiality of the public service. It certainly has been the case that a number of Canadian public servants have entered and become prominent in political life over the years, including one member of this Task Force.

There are several considerations, which in our view are persuasive, in favour of a politically neutral public service. Ministers and parliamentarians have a related concern that officials should not use their public positions to promote their personal political philosophies. Ministers have an additional interest in that they must be assured that the advice they receive is not motivated by partisan or other types of political considerations, and that, in the execution of decisions and administration of policies, their officials act in good faith. The public service itself, aspiring to serve governments of varying political complexions, has a complementary interest -- its own rationale depends upon being perceived as the impartial servant of whatever government is in office. Individual public servants, while having an obvious personal interest in these general concerns of the public service about maintaining its neutrality, are also affected by policies in this area if they wish to exercise the basic democratic rights of Canadian citizens as regards political activity. Finally, the interests of the public are diverse. Citizens must be assured that political allegiance is not a factor in the dealings they have with government departments and agencies. Citizens, along with public

servants, expect that advancement in the service will be on grounds of merit rather than partisan reward.

These considerations apply not only to public servants, but have an equal bearing on employees of Crown corporations and autonomous agencies, members of the Armed Forces and the Royal Canadian Mounted Police.

The traditional doctrine and practice of political neutrality has been modified by the broadening of the permissible limits of political activity, but the effect has not, to date, been rapid or revolutionary. However, the delineation of permissible rights and the full impact of the Canadian Charter of Rights and Freedoms are yet to be seen.

While the tradition of anonymity has remained strong among non-elected public office holders, their visibility has been heightened by changes in political institutions and practices, not to mention the results of the Access to Information legislation and the response of the media to demands for more public information. Indications are that this decline in official anonymity will continue.

In a democratic society it is desirable for all citizens to have a voice in the affairs of the State, and for as many as possible to play an active part in public life. Yet the public interest demands the maintenance of political impartiality in the public service and of confidence in that impartiality as an essential part of the structure of government in this country.

The principle of political neutrality can be expressed as follows:

> Non-elected public office holders must not engage in partisan political activities which will jeopardize the political neutrality, both real and perceived, of the public service.

8. Criticism of Government Policy

Closely entwined with the question of partisan political activity is the "well-established tradition that Government employees do not express publicly their personal opinions on matters of political controversy or on existing or proposed Government policy or adminstration".6

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6. Kenneth Kernaghan, Ethical Conduct: Guidelines for Government Employees, op. cit., p. 35.

We recognize that this tradition, like the tradition of political neutrality of the public service, is under attack from various quarters and for several reasons. Government employees are called upon increasingly to provide information about programs, and to operate in conciliation type roles. We often hear Canada described as an "information society" and this fact, combined with the frequently expressed ideal of a well-informed public, requires public office holders to be ready, willing and able to spread information about government policies and operations whenever possible. Moreover, as new functions are developed in government to take over tasks traditionally fulfilled by elected representatives -- such as meeting with interest groups and community representatives to hear their grievances and work out solutions to problems -- a number of senior public office holders have come to perform in a fashion which makes public comment almost inevitable. Greater interest on the part of the media to report the views of certain public office holders has become another factor in this equation.

What is certainly required is guidance for public office holders, as to the kinds of public comment in which they may engage, the procedure to be followed in contacts with the public and the press, and the means of resolving uncertainty regarding the types of public comment which constitute permissible conduct. For example, it is not intended to limit the rights of any employee in relation to any matters lawfully within the subject of collective bargaining under the Public Service Staff Relations Act. We believe that an effective means of achieving this objective is to include a rule on public comment in a code of ethics. This will be discussed in detail later in this report. For the time being, the following basic principle is expressed:

> Public office holders shall not express publicly personal views on matters of political controversy or on government policy or administration, where this is likely to impair public confidence in the existing or subsequent performance of their duties or which is likely to impair relations with other governments.

The above rule does not prohibit employees from exercising their rights under the Public Service Staff Relations Act.

9. Conduct Unbecoming to One's Public Position

The way in which public office holders conduct themselves on a personal level can have significant impact on both their ability to discharge their duties adequately, and on the public perception of government.

Our terms of reference include reviewing the policies that should govern the conduct of public office holders. We do not wish to interpret this so broadly as to enter upon matters of personal behaviour of those in the public service. We have noted, nevertheless, in our review of existing guidelines, particularly the supplemental codes of conduct and various draft codes now being developed, that there is increasing discussion, in the context of dealing with conflict of interest questions as they have traditionally been interpreted, of topics such as harassment (sexual or otherwise) of personnel at the workplace.

One significant area of personal conduct that obviously would be improper for those in government service would be inappropriate discrimination in the performance of one's duties. The law already prohibits discrimination against any person by reason of race, national or ethnic origin, colour, religion, age, sex, marital and family status, disability, or conviction for which a pardon has been granted. This concerns, for instance, how government officials and employees deal with members of the public.

Beyond this, all employees and officials in the public service of Canada have the right to be treated fairly in the workplace, and to be able to operate in an environment free from discrimination, personal harassment and sexual harassment. Any behaviour which denies individuals their dignity and respect, or any use of authority or position to intimidate, coerce or harass, cannot be tolerated. This applies both to one's fellow members of the public service, and to the members of the public with whom one is dealing.

"Personal harassment" would include any behaviour by a person that is directed at and is offensive to an employee or endangers an employee's job, undermines the performance of that job or threatens the economic livelihood of the employee. "Sexual harassment" would be comprised of offensive sexual comments, gestures or physical contact that may be deemed objectionable or offensive, either on a one-time basis or in a continuous series of incidents, however minor. Generally, sexual harassment is behaviour of a sexual nature that is deliberate and unsolicited. Such harassment is coercive and one-sided, and both males and females can be victims of it.

It is an abuse of authority for an employee to use his or her authority or position with its implicit power to undermine, sabotage, interfere with or influence the career of another public servant, or interfere with the provision of goods and services to the public. This includes such blatant acts of misuse of power as intimidation, threat, blackmail and coercion. It applies to the distribution of work assignments, training or promotional opportunities, the evaluation of performance, or the provision of

references. It also includes favouritism of one employee to the disadvantage of another.

Employees in the public sector should of course be mindful of the public image of their department or agency. A sense of professionalism is required on the part of those in public service, in the way they deal with others, so as not to bring the government into discredit.

The principle here can be stated as follows:

> Public office holders shall not engage in personal conduct which exploits for private reasons or personal gratification their position of authority, nor which would tend to discredit the professionalism of the public service.

CHAPTER 4

WHO IS RESPONSIBLE FOR ETHICAL CONDUCT IN THE PUBLIC SECTOR?

Maintaining standards of ethical conduct is everybody's business. Eight separate loci of responsibility have been identified and each is now considered in turn.

1. Responsibility of the Individual

Under the present guidelines governing conflict of interest, primary onus rests with the individual to ensure that he or she is not in an actual, apparent or potential conflict of interest situation, and that if such a problem arises, it is the individual's responsibility to see that the difficulty is resolved satisfactorily . We recommend that this concept of individual responsibility be retained. There are at least two basic reasons for stressing the importance of individual responsibility in dealing with conflict of interest issues.

First, it is in the mainstream of our Judeo-Christian philosophy to recognize that the individual is responsible for his or her own actions. This is such a basic concept in the fundamental philosophy of our society that it provides an important underpinning for any system of rules regarding ethical conduct in government. This approach rejects the excuse that "I was only following orders" or that "Everybody else was doing it", a theme reiterated with great poignancy at the Nuremberg war trials in Germany after 1945, when a number of officials from the Nazi Government were brought to trial and convicted of war crimes. The principle was upheld that one cannot transfer to the collectivity, or to some autonomous organization, responsibility for one's unethical or criminal acts. A system which fixes on the individual's personal responsibility for his or her actions keeps the sharp edge of reality where it is most effective.

A second reason for incorporating the concept of individual responsibility into any system of rules respecting ethical conduct in the public service pertains to management-labour relations. When it is clearly understood that an employee is responsible for conducting himself or herself in an ethical fashion, and within specific and stipulated rules, then any breach of these rules constitutes grounds for disciplinary action against

that individual. Without the link between individual responsibility and compliance with rules of conduct, there would not be an adequate legal basis for management to bring an errant employee to account.

2. Responsibility of Management

It is also essential to recognize a responsibility on the part of management in dealing with conflict of interest issues. The responsibility of public service management is to ensure that procedures are in place to handle conflict of interest questions and that the methods by which officials may seek advice and have decisions reached in resolving conflicts are well known and understood. This responsibility is twofold: to develop effective procedures, and to publicize them adequately so that individuals will know where to turn when they need advice or need to disclose a conflict to their superior.

3. Responsibility of the Prime Minister

A large measure of responsibility rests with the Prime Minister in relation to matters of ethical conduct in the public sector for several reasons.

First, the Prime Minister sets the tone for the entire government. By his or her conduct, and that which he or she requires from others, a clear signal is given to all those in the public service, and to the country at large, as to the standards which are being followed. This was understood, but we became all the more convinced of its importance in reviewing how the increase in the number of public servants, and the greater scope and range of government activity in the economy, have fundamentally altered the nature of government itself. The setting in which public servants operate has changed.

As we reviewed the situation elsewhere, in the United States at the federal level, for example, we came to appreciate the difficulties that arise when responsibility for matters of ethical conduct tends to be located at the mid-management level. More senior officials are seen to deal with policy and general administration, but questions of ethical conduct are treated, by inference at least, as having lesser importance. For this reason, the importance in the American system of having the President attach priority to questions of ethical conduct, and to say so publicly, has been stressed. With respect to the private sector situation in Canada, it was emphasized that the chief executive officer of a company must clearly demonstrate to all employees that adherence to a code of conduct is a significant matter. In short, a clear signal must come from the very top.

Secondly, the Prime Minister is responsible, directly and indirectly, for most senior government appointments, including all Cabinet ministers, parliamentary secretaries and deputy ministers, and many Governor-in-Council appointees. In the process of making these appointments, or seeking the resignation of those whom he or she feels should no longer continue in office, a Prime Minister is guided by a number of factors, one of which certainly is the question of the probity of the individuals in question. The Prime Minister has prerogative powers to make rules in this area, and indeed it is on this basis that the current guidelines, embodied in Orders-in-Council, originated.

4. Responsibility of Law Enforcement Agencies and the Courts

A number of the more serious conflict of interest problems are contemplated by provisions in the Criminal Code. In Canadian law enforcement, police officers and others affiliated with enforcement have a responsibility to investigate allegations of unlawful conduct, and to lay charges where warranted. Sometimes it may be difficult to draw the line between breach of conflict of interest rules, and violation of the Criminal Code. During the course of our review, a matter was under investigation by the RCMP and departmental officials involving allegedly unethical or illegal activities in the translation services of the federal government, in connection with which criminal charges had been laid by the police against certain individuals, and disciplinary proceedings initiated by manangement against certain other individuals.

The responsibility of the courts in cases involving issues of ethical conduct which come before it is, of course, to interpret the facts and apply the law in a just fashion. In the process, the role of court proceedings can be of importance in sending a general message to Canadian society about the way in which unethical and unlawful conduct is dealt with. It can be said that courts have a responsibility not only to deal with the specific case before them, but to address, in the process, the larger public audience.

5. Responsibility of Parliament

Not all current policies and procedures dealing with conflict of interest are contained in Orders-in-Council. A number of provisions are found in acts of Parliament. In this sense, Parliament has a responsibility as law-maker to ensure that those provisions which it enacts dealing with matters of ethical conduct and conflict of interest are intelligently framed and adequately stated. Several cases of admirable wording are noteworthy such as section 3.(5) of the National Energy Board Act which prohibits members of the board from owning any financial interest in energy-related corporations. The section, which consists of a

single sentence, is comprehensive but precise. Those who initiate further legislation in this area should be mindful of the desirability of simplicity, comprehensiveness and conciseness in the statement of ethical rules.

Parliament has other responsibilities in this area, besides enacting laws. A number of parliamentary committees have jurisdiction over areas or subjects where matters of ethical conduct can arise, and thus Parliament has a "watchdog" responsibility to ensure that these matters are aired responsibly whenever necessary.

Parliament is a forum for competing and conflicting interests, and a number of statutory and other provisions regulate the way in which parliamentarians can involve themselves, or make representations on behalf of certain groups, in the legislative process. A number of sections in the Senate and the House of Commons Act govern this area of activity, and these provisions are supplemented by several others, such as those of the Criminal Code, the Canada Elections Act, and the Standing Orders of the House.

Another way in which parliamentarians have a responsibility is by setting an example, since they are prominently in the public eye and their actions and ethical conduct send a signal to the public service and the country at large as to the norms of acceptable behaviour.

6. Responsibility of the Political Parties

Political parties do not welcome scandals involving their members, and for this reason have an interest in ensuring a proper degree of ethical conduct. This interest, in some respects, translates into a responsibility. Because the party apparatus is ongoing, and the name and reputation of a political party is a matter of goodwill and reputation over time, any dishonest or unethical activity by party members, whether elected or in certain cases appointed to public offices, constitutes sufficient reason for taking whatever disciplinary action or other sanction may be available. While an individual seldom is drummed out of a political party in Canada, party discipline can be brought to bear in various ways.

Furthermore, political parties have a responsiblity to ensure that their policies or programs include measures designed to address, or respond to, the important issue of ethical conduct in the public sector. This is hardly an academic matter, since questions of this nature arise from time to time in Canadian public life, and political parties through their spokespersons have a responsibility to address the issues involved. We would

expect that political parties would consider this report and adopt policy in relation to its recommendations.

7. Responsibility of the Media

A significant measure of responsibility rests with the media, first, to bring conflict of interest problems to public attention when they are uncovered, and secondly, to do so in a responsible fashion. With respect to this first responsibility, namely, publicizing cases of unethical conduct, it is hard to overstate the important role which the media play in drawing problems to public attention. In practical and political terms, without the media bringing such matters before the court of public opinion, transgressions might not receive the condemnation they warrant.

Earlier we mentioned "Don't do anything you'd be embarrassed to read about in tomorrow's newspaper" as an easy rule of thumb to use in deciding whether a particular action would constitute unethical conduct. From another perspective, without the media, the essential link between the individual and public opinion in relation to which he or she determines an appropriate course of action may be missing.

As Michael J. Smither has observed, the role of public watchdog overseeing the political process has traditionally been assumed by the media.[1] If correctly discharged, the media's responsibility proves helpful in ensuring that public policy objectives are met. He states that, however,

> the need for veracity when reporting on the subject of conflict of interest and also for a clear understanding of the legislation cannot be over-emphasized. These requirements are an imperative. The consequences of failure to accurately report on such matters can have wide implications for the journalist, the members affected and, ultimately, for the public whom both seek to serve.

He suggests that when a journalist fails to discharge this responsibility, the public may be misinformed; the intent of the legislation or rules governing ethical conduct may be negated;

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1. Michael J. Smither, Municipal Conflict of Interest (St. Thomas, Ontario: Municipal World Inc., 1983), p. 123.

the member, or potential member, of the legislature may be discouraged and may suffer financial or other damage in his or her political, business and social life; or the journalist and his or her publication may face an action for libel. Alternatively, a contravener of the rules may escape detection or be otherwise encouraged.

Apart from these consequences, a competent journalist understands that a quest for truth in the realm of ethical conduct must begin with knowledge of the objectives of the applicable laws and rules, and of the duties which they impose upon the public officials subject to them.

8. Responsibility of Educators

Those who educate and instruct us -- parents and other family members, teachers, the clergy, professors, judges, or superiors for whom we work -- have a clear responsibility to transmit from generation to generation a sound understanding of ethical values.

The code of ethical conduct which we propose would be meaningless without the pre-existence of a public consciousness and awareness of the importance of honesty and ethical behaviour. In this context, we recommend that the Ethics Counsellor be given the mandate to educate, inform and instruct persons to whom guidelines apply, the authorities responsible for their administration, management within government and all those concerned with this domain.

CHAPTER 5

ALTERNATIVE APPROACHES: UNWRITTEN RULES, CODES OF CONDUCT, GUIDELINES, STATUTORY REGIMES, ETHICS COMMISSIONS

Various methods exist for dealing with conflict of interest situations, and this chapter contains general observations about these alternative approaches.

(a) Unwritten Rules

The approach which has been the most wide-spread in Canada and still applies in a number of provinces is the traditional one of having no written rules and of relying on people's sense of what's right rather than on words on paper as a guide to what can and cannot be done when private and public interests conflict.

When the two of us entered Cabinet, as noted earlier, there were only unwritten rules governing ministerial conduct and conflict of interest. The same was true generally in the public service.

In the course of our review, we spoke with a number of senior public servants and former public servants, many of whom recalled the days of unwritten rules. "We all knew what you could and could not do, and besides, there were so few of us that we all could keep an eye on one another," observed one former deputy minister. This official and several others expressed a certain nostalgia for those days of a simpler approach to questions of ethical conduct. There was a yearning for the ethos of government in which ethical conduct was assumed to be the norm, and one's integrity and reputation, perhaps fortified by the watchful eye of close colleagues, would have made writing down rules to stipulate the bounds of ethical conduct seem unnecessary.

Yet everyone was unanimous in acknowledging that it is impossible to go back to the era of unwritten rules. The increase in the number of public servants, and the greater scope and range of government activity in the economy, have altered the nature of government fundamentally. The setting in which public servants operate has changed. Precise written codes of conduct could be as

helpful a guide today as the unwritten code was yesterday. As a committee of senior civil servants in Britain, reporting in 1972 on professional standards in the public service, concluded: "The existence of a comprehensive but intangible and unwritten code would be hard to verify and runs counter to many people's experience. We believe reliance on it leads to dangerous complacency."[1]

(b) Codes of Ethics

No one suggests that the mere existence of a code of ethics is a simple and complete cure for problems of ethical conduct in the public sector. "The extent to which a code of ethics has value," suggests Professor Kernaghan, "depends on whether the code is written or unwritten, on its acceptance by the public and by government employees, and on its form, content and administration."[2] In dealing with the merits of a written code, he says that government employees, as citizens, naturally adopt the ethical practices and standards that are accepted by society and tend to reflect them in their actions at work and away from work. A formally written code of ethics provides employees with a reference point from which they may assess their own conduct as well as the conduct of those around them. It stipulates what kinds of behaviour are prohibited and can indicate the penalties associated with any violation of the principles.

Once a code is in place, employees will tend to use it as a form of self-discipline; they will come to know inherently how they should conduct themselves. The role of senior employees is important in keeping employees informed regarding what is expected and they must also demonstrate exemplary behaviour. The expectations of peers in terms of ethical standards can also be a positive influence on employees. The raising and maintenance of ethical standards among groups of employees will be higher with the existence of a written code.

Of course, there will always be employees whose behaviour remains unaffected by the establishment of a code of ethics. It is for this group that a written code can be used as an administrative control - particularly if it includes specific sanctions. In such cases, management can use the code as a yardstick to measure the degree of non-acceptability of certain behaviour and the seriousness of specific breaches of conduct.

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1. Professional Standards in the Public Service, a Report by a Sub-Committee of the First Division Association, Public Administration (U.K.), 50 (Summer, 1972), p. 169.

2. Kernaghan, Ethical Conduct, op. cit., p. 5.

Despite this, there are some strong arguments for an unwritten code. It is reasoned, first, that employees can best conduct themselves based on customary practices and informal understandings. Second, there is evidence that many cases of unethical behaviour cannot be covered by a written code. Third, it may be difficult to obtain agreement on what conduct should be considered acceptable or unacceptable.

(c) Guidelines

The present conflict of interest rules at the federal level are, for the most part, contained in "guidelines" that are largely hortatory in nature. The wide-ranging interpretation that different individuals place on the meaning and legal significance of guidelines is a source of concern. To some, guidelines are law, to others merely helpful advice and suggestions as to the direction one ought to follow. For those of the latter school of thought, it is certainly not the end of the world if one's actions are outside the guidelines; to the former, violation of the guidelines would be like breaking any other law.

The looser interpretation of the concept of "guidelines" is perhaps easier for those thinking in the English language than in French, since the French expression "lignes directrices", which is the equivalent of "guidelines" in English, contains a clearer notion that these lines or rules are directory.

Administrative law recognizes a clear distinction between directory and mandatory statutory procedural requirements: the latter must be followed to the letter whereas the former need only be substantially complied with. Moreover, administrative law also recognizes a distinct legal significance to guidelines, policies, manuals and the like that have no force in law. They may be followed, but need not be. Equally important, they must not be applied as if they were law.

A specific problem of the present guidelines is that they combine both general principles and procedural matters, whereas in our view these should be dealt with separately. There has been an effort to separate basic principles from matters of procedure, and the guidelines have been divided into parts with some provisions annexed as schedules. Yet, in our view, the separation has not been adequate, with the result that principles and procedures are often intertwined.

Because of the varying of interpretations of the meaning of guidelines, and because this term has been used long enough now in connection with the rules applicable to the federal public sector, so that this ambiguity or uncertainty of meaning has become both widespread and entrenched, it is recommended that use of the term "guidelines" be abandoned.

(d) Statutory Régimes

It has been a particular hallmark of the approach to ethical conduct in the United States to enact a statute, and typically to establish an independent "Ethics Commission" or similar body to ensure compliance with the rules stipulated in the Act.

The advantage of a statutory régime is similar to the advantage already noted with respect to written codes of ethics; those concerned are certain of the rules since they have been confined to writing, and the existence of such provisions is also useful as an instrument of public administration. In the case of such codes being embodied in statutory form in the United States, the further advantage is that these rules have the force of law, and are attended by normal procedures of "due process", the clarity of sanctions, and an easily established reference point for those seeking legal interpretation of their rights and obligations.

A disadvantage, in the eyes of some, is that this approach tends to make procedures relating to ethical conduct overly legalistic. This school of thought would favour a purely administrative approach, assisted by some discretionary powers and greater latitude for interpretation.

In most cases enactment of a statute to deal with ethical conduct represents an effort to deal generically with the problem, in a full and broad-based fashion. This American approach stands in contrast to what, more typically, has been the British-Canadian approach of an incrementalist response to particular problems as they have arisen by developing specific policies or rules, and even at that, by leaving those rules more in the realm of public administration than of law enforcement.

Several Canadian jurisdictions have taken the legislative route. In New Brunswick for example, conflict of interest provisions applicable to ministers, deputy ministers, judges, ministers' staff and members of the legislative assembly are contained in the Conflict of Interest Act 1978. Provisions pertaining to members of the legislatures at all levels in Canada (federally, provincially, and territorially) are expressed in statutory form, as in the Senate and House of Commons Act, and the various legislative assembly statutes and ordinances across the country. At the municipal level, the statutory approach has also been adopted in several cases, such as with the Municipal Conflict of Interest Act of Ontario which applies to all municipal councils throughout the province. Most of these enactments pertain to elected representatives.

As far as public office holders are concerned, the Canadian approach, generally speaking, has been to avoid the approach of enacting a single comprehensive statute to govern ethical conduct. It would be a mistake, however, to suggest that no legislation has been enacted in this area, since there are many individual provisions in a variety of statutes that deal with particular conflict of interest matters. These scattered provisions are, once again, typical of the incrementalist response to the problem.

In jurisdictions which have adopted a statutory régime to govern ethical conduct, such as at the federal level in the United States, with its Ethics in Government Act, a fairly large body of jurisprudence, legal opinion and interpretative bulletins has subsequently developed to assist in applying the law to specific situations. Two American publications now exist to deal with this plethora of rules: the Federal Ethics Handbook, which is an annotated legal guide, and the Ethics in Government Reporter, which is a digest of statutes and executive orders, federal regulations, case rulings, Office of Government Ethics advisory opinions, agency regulations, notes on legal professional responsibility, and forms.

We do not believe it is necessary to use so many words to delineate and interpret the acceptable balance of ethical conduct in the public sector. We doubt the Canadian experience would parallel that of the United States, a country with two-thirds of all the lawyers in the world, which has followed a more litigious approach and a more entrenched concern for "due process" at all stages, resulting in a scale of operations, which, if translated into the Canadian context, would be unnecessarily large. The rigour and effectiveness of rules for ethical conduct do not in our view depend on the size of the operation established to administer them, as much as on other key factors.

(e) Ethics Commissions

Under a number of the United States statutes referred to in the preceding section, an Ethics Commission is constituted, given a mandate to enforce and interpret the rules of ethical conduct, asked to perform an educational role with respect to the rules, and required to be available for consultation and advice to government administrators who deal with conflict of interest problems. The existence of such a commission is the necessary concomitant of a regulatory approach to this subject. It is, in a way, similar to passing a securities act, which among other things establishes a securities commission to ensure compliance with the newly enacted securities law.

Such commissions operate under various names. For example, at the federal level in the United States, there is the Office of Government Ethics, while at the state level one finds the "States Ethics Commission" (for example in Hawaii, South Carolina, and Massachusetts), and variations on that theme, as in "State of Florida Commission on Ethics", "State of Wisconsin Ethics Board" and "Illinois Board of Ethics". Some commissions have broader mandates as reflected in their names as for instance, the "State of California Fair Political Practices Commission".

The mandate of a number of these American state commissions is broader than the concept of ethical conduct in the public sector on which we are focusing in this report. For example, the rules governing election finances, campaign contributions and disclosure are administered by some of these commissions. In Canada, financial assistance in the form of campaign contributions has traditionally been kept distinct from prohibited fees (something which, with Criminal Code provisions, is very much a conflict of interest matter), provided such contributions are not intended as another form of prohibited fees. As noted on page 17 of the 1973 Green Paper on Members of Parliament and Conflict of Interest, election expenses are a subject area closely related to conflict of interest but, because of growing complexity in both fields, are best treated separately. It must be acknowledged that conflict of interest provisions will remain incomplete unless there are also provisions in the area of campaign contributions.

In 1974, the year following the tabling of the Green Paper, the Election Expenses Act (S.C. 1973-1974, chapter 51) was enacted by Parliament to meet precisely this point, with the result that we now have operating in Canada at the federal level a separate legal régime, administered by the Commissioner of Canada Elections, to deal with election contributions and campaign expenses. In several of the American states, separate commissions have likewise been created for this purpose, and they function independently of state ethics commissions, although we have been advised by the executive directors of a number of these bodies that there is frequent communication between them to ensure compliance with their respective statutory régimes, which can be verified by cross-checking certain disclosure reports.

What is striking about the role of ethics commissions or similar bodies is their ability to play a continuing and dynamic role in educating public servants, and indeed the general public, as to the nature of the rules governing ethical conduct. We reviewed a number of their publications and video programs, and sat in on several "ethics seminars" and we were impressed by the positive role that can be played in raising people's consciousness for recognizing conflict problems when they arise, and for knowing how to resolve them. Indeed, our impression is that many such

commissions play a more important role as educator than as enforcer.

After reviewing these general approaches, it is concluded that dependence on unwritten rules is no longer feasible or desirable, that there is merit in the formulation of a code of ethical conduct for the public sector, that the term "guidelines" should be abandoned, that any statutory régime should avoid the legalistic United States pattern and that the proposal for an Ethics Counsellor has merit. In the next chapter, the techniques for dealing with conflicts of interest are described including divestment, disclosure and the establishment of trusts.

CHAPTER 6

TECHNIQUES TO MINIMIZE CONFLICTS OF INTEREST: DIVESTMENT, THE ESTABLISHMENT OF TRUSTS, DISCLOSURE

The first principle of ethical connduct which we set down in chapter 3 states that public office holders must not have personal interests which would be affected particularly or significantly by government actions in which they participate. The subject discussed in this chapter is the variety of techniques that can be used to get rid of the property interest that creates the conflict.

(a) Divestment

In theory, divesting oneself of assets and business connections frees one for execution of one's official responsibilities without any risk of a conflict of one's governmental responsibilities with one's personal economic interests. One cannot deny the purity of purpose that an individual, having no vested interests, would have in decision making and policy implementation. Yet, there are no certainties in this area of human motivation and ethical conduct, and one might even suppose that a public office holder who had divested himself or herself of every single asset and business affiliation could thereafter come to feel a sense of envy, or jealousy or insecurity in relation to others around him or her. Were this the case, could one still ascribe to him or her such purity of purpose in his or her official actions?

The policy which holds that a public office holder should divest himself or herself of certain financial interests and obligations, as part of qualifying to hold a position of public trust, is a form of preventive medicine. This approach recognizes that public office holders, including ministers, must make major decisions which will have wide impact, an impact that could, sooner or later, reach to assets or interests with which the person is personally connected. Therefore, rather than an individual continually worrying about whether a particular decision will affect one of his or her specific vested interests, and rather than having the public perceive that a public office holder could be ensconced in a position to confer benefits upon himself or herself, it has been decided that the problem should be removed in advance by requiring divestment of certain types of assets and relinquishing of certain types of interests by those in authority.

Divestment can take a number of forms under the guidelines currently in force for public office holders where it is required. There is, to begin, a concept of exempt property which does not come under the severing axe. Beyond this, there are alternative means of divesting one's interests in non-exempt assets: either through outright sale at arm's length or through placing those assets in a trust. The system of disclosure is also relevant.

(b) Trusts

One of the ways by which an individual can divest himself or herself of non-exempt assets, as an alternative to outright sale, is to place them in trust.

There are several varieties of trust arrangements in use under federal guidelines, such as frozen trusts, blind trusts and retention trusts. With time, it may be that additional types of trusts will be devised to satisfy completely the myriad requirements in this complicated and refined area of holding and managing one's financial assets. For the present, we confine ourselves to descriptions of current arrangements i.e. frozen trusts, blind trusts, collateral arrangements with impact on trusts, and retention trusts.

1. Frozen Trusts

A frozen trust is one in which the trustee is instructed to maintain the holdings placed in trust exactly as they were when the trust was established. A person who establishes a frozen trust is entitled to receive from the trustee any income earned by the trust, and any information which is required by law to be filed.

The frozen trust option is currently made available to all public servants through a Treasury Board decision of 1982 with certain specific exceptions which are outlined in some of the supplemental guidelines of individual departments or agencies.

Until recently, the Assistant Deputy Registrar General (ADRG) was not authorized to act as trustee for frozen trusts required by public servants. The ADRG, of course, has general responsibility for administration of trusts for public servants. However, at the end of September 1983, it was accepted that nothing prevented the ADRG from acting in that capacity, in the same way he had been doing in the case of Governor-in-Council appointees. Since equity dictates that the services of the ADRG as trustee be available to all who are permitted to have a frozen trust, the concept was accepted by officials of the Treasury Board, the Privy Council Office and the Office of the ADRG.

As far as Governor-in-Council appointees are concerned, the frozen trust concept with the ADRG serving as trustee existed as a result of the Guidelines for Ministers of the Crown announced by the Prime Minister in 1973, and was included in the written Guidelines for Governor-in-Council Appointees in November 1974 as a matter of course. The Guidelines for Ministers' Exempt Staff as they were written in 1975 also provided for frozen trusts, including the facilities of the ADRG.

With a few exceptions, frozen trusts have tended to be established with the ADRG acting as trustee, rather than with other eligible trustees. These few exceptions have generally been where some form of retirement fund had already been contemplated or undertaken by the individual and the frozen trust established was merely a continuation of arrangements previously made to hold on to specific shares within the options available in the guidelines.

The main advantage of having a frozen trust is that the individual concerned knows that the assets placed in it will be returned unaltered except for share splits or redemptions as soon as he or she is no longer subject to the guidelines. There has been a significant saving for individuals having frozen trusts with the ADRG because, apart from a few out-of-pocket expenses to set up the trust, no other charges apply since the administrative cost is part of the ADRG's regular budget.

During the period when ministers' exempt staff and Governor-in-Council appointees could have their assets in frozen trusts, they only took advantage of the option to a limited extent. In some cases, reasons for establishing the trust rather than selling the assets were that the shares had sentimental value but very little intrinsic value, the individual had been left the shares by a close relative and did not wish to make any changes, or the individual was not expecting to remain in government service for very long before retirement.

Some frozen trusts contained worthless shares. In several cases, these valueless shares became actively traded and it was then considered appropriate by the ADRG to allow the individuals concerned to switch their holdings to a blind trust.

Most frozen trusts have consisted of a small number of securities, and the understanding has been that such securities were not to include any items which the ADRG would have to "manage" other than to collect dividends, receive share splits, or to realize upon the proceeds of rights which could be sold automatically. Frozen trusts were not and are not considered suitable for convertible securities, real estate, or other investments which require active participation by the owner of the securities or the persons acting as inter vivos trustees.

There are certain disadvantages to frozen trusts. For example, offers to purchase shares have occasionally been forthcoming, but have had to be ignored by the ADRG under the terms of the trust deed. These offers remain open until such time as 90% of the shares have been taken up by the purchaser. By that time, however, the trustee has been able to respond to the obligatory redemption or exchange. These problems arose, for example, with the Canada Permanent takeover by Genstar and the amalgamation of the Unity Bank with the Provincial Bank, followed by the fusion of the Provincial Bank with the Canadian National Bank. On a couple of occasions in the early days of operation of the Office of the ADRG, a share that was convertible was accepted in a frozen trust. In one case, convertibility was prevented and the individual beneficial owner had to treat this as a "cost" of being subject to the guidelines. On another occasion, an individual had a very small holding of a convertible stock which was subject to a redemption or conversion call by the company. Since more than 90% of the shares had been converted, the view of the Office of the ADRG was that conversion did not imply management of the assets. Today, it is not likely that a convertible security would be accepted into a frozen trust except under specific conditions which were known to the settlor and the trustee and agreed upon prior to execution of the trust agreement.

Since the option of using the ADRG for frozen trusts by public servants has not been publicized, few have taken advantage of it. The number of frozen trusts is small, but it should be noted in this context that the guidelines applying to ministers and to designated exempt staff since 1979 no longer permit frozen trusts as one of the methods for divestment.

2. Blind Trusts

A blind trust is one in which the trustee is empowered to make all investment decisions concerning the management of the trust assets, with the person who has placed the assets in trust having no direction or control. No information is given to the settlor about the status of the assets, except information required to permit an annual evaluation of the trust and any information which is required by law to be filed. The settlor can receive income earned by the blind trust, and add or withdraw capital funds as he or she sees fit.

Blind trusts have existed from the inception of the guidelines in 1973, and are available as a means of divestment for all groups. Indeed, blind trusts were established in several cases long before the advent of the guidelines, and it was necessary to rewrite certain parts of such existing trust provisions to ensure they conformed to the new requirements established in the guidelines.

Several points to observe about the present arrangements and operation of blind trusts are that the ADRG may not act as a trustee of a blind trust, and that the eligible trustees for Governor-in-Council appointees are a wider group than those in the current Guidelines for Ministers and their designated exempt staff. The Governor-in-Council appointees may have a trust with anyone at arm's length who is accustomed to acting as a trustee, while the current Ministers' Guidelines provide that the trustees must include either a trust company or a member of the Investment Dealers Association of Canada. These can be either sole trustees or trustees in addition to others, but in any event they have a casting vote.

In many cases the ADRG acts as a go-between in establishing blind trusts, and is obliged to rule on whether the trust arrangements as adopted by the settlor with his or her trustee meet the requirements of the applicable guidelines. The ADRG has streamlined this process by offering sample blind trust documents to those seeking to establish such a trust. These samples or precedents include trust documents suitable for use in any province in Canada (including Quebec, where the terminology and legal concepts in the trust area are somewhat different). Adaptations of several discretionary account agreements for stock brokers and their clients also are made available. In short, the ADRG has tried to ensure that the simplest means of setting up a blind trust can be followed, having regard for the essential conditions which are spelled out in the guidelines.

The blind trust must be irrevocable and its term must be for as long as the settlor continues to hold any office to which conflict of interest guidelines apply or until his or her death, whichever first occurs. Should the assets of the trust be exhausted, due to demands by the settlor for capital funds or due to bequests made to beneficiaries, the trust, for all practical purposes, terminates and can be revoked. As a practical matter, however, it can be in the interests of the settlor to maintain the trust in existence in case he or she wishes to have funds invested in the future or inherits non-exempt property which cannot be held personally. The trust must be declared to be domiciled within a particular jurisdiction. The jurisdiction is usually the province in which the assets are located or in which the settlor resides. By so domiciling the trust it becomes subject to the trust laws of that jurisdiction, and the terms and conditions of the agreement are interpreted in accordance with those trust laws.

The disadvantage of a blind trust is often that the cost is high in relation to the value of the assets being placed in trust. The more substantial trusts have their costs offset by the income, but those who felt themselves obliged to establish a small blind trust have had to pay considerably more than the income generated for the privilege of maintaining such a vehicle for their investments.

3. Retention Trusts

In cases where holding companies have been established for estate planning purposes, rights in such companies may be put into a trust for retention. In such circumstances, the trustee may not dispose of or otherwise affect the rights placed in trust. The Assistant Deputy Registrar General may serve as trustee of such trusts.

In establishing such trusts, ministers may make arrangements to have third parties exercise their voting rights in relation to the shares in the holding company as long as such arrangements will not result in a conflict of interest. Ministers who have established such trusts cannot be consulted or informed of the disposition of any assets owned by the holding company that would be considered to be "controlled assets" under the terms of the guidelines applicable to ministers of the Crown.

Retention trusts are a recent innovation, first permitted under the guidelines of April 1980 for ministers of the Crown. Because the retention trust requires the formation of a family holding company for estate planning purposes, it is not a vehicle which is suitable for many people.

In practice, a blind trust can be a retention trust, particularly in respect of Governor-in-Council appointees who do not have the option of a retention trust. The frozen trust option available to Governor-in-Council appointees is not, however, the equivalent of a retention trust since the formation of a holding company is not necessary in the case of a simple frozen trust.

The main advantage of the retention trust is that it is a useful divestment vehicle for ministers who have substantial assets and who have arrangements in place which require that the assets be held under proper management through a holding company. The disadvantage of such a trust is that it is a prohibitively expensive route to be followed by someone of modest means who would rather have had a frozen trust.

4. Collateral Arrangements Regarding Trusts

In a number of situations, individuals have been in a position where their security has already been hypothecated to a financial institution in support of a loan. The typical example would be where a Governor-in- Council appointee has a bank loan secured by publicly traded shares. This situation of course raises the question of how such shares are to be dealt with in terms of divestment.

There are two ways of dealing with this situation. One is to transfer the security to a trustee and have the trustee make some form of undertaking to the lender with regard to the

collateral for the loan. The second method, often involving a temporary situation, is to agree that the collateral arrangement with the lender is tantamount to a blind trust. For example, a senior public official transferred to Ottawa from another location, unable to sell his house, pledged his securities to a bank in order to borrow sufficient funds to relocate in Ottawa. This collateral was held by the bank, and an agreement was made whereby the securities would be placed in some form of trust if and when the need for the collateral ceased. This arrangement at its inception was considered to be tantamount to a blind trust; to be strictly accurate, it could be argued that it was as much in the nature of a frozen trust. It would depend on the circumstances at the termination of the loan as to whether the term "frozen" or "blind" should be used to typify this kind of trust. In either case, it was always possible that the security would be sold in order to repay the loan and there would thus be no assets to be placed in the trust.

5. Income Tax Considerations of Trust Arrangements

Advice on income tax is not something which is offered by the Office of the ADRG. It is understood that individuals who are subject to the guidelines are told that any special arrangements which they make for their assets may have income tax consequences, and are advised to seek proper legal and accounting counsel accordingly.

6. Audits of Trust Arrangements

Audits are required for blind, retention and frozen trusts. For both blind trusts and retention trusts, provision for an audit is usually included as a clause in the agreement. For frozen trusts, audit is considered a matter where the privacy of the individual requires that the audit be conducted by an outside auditor rather than by anyone from within the government. Currently, a chartered accountant audits the frozen trusts on an annual basis where the ADRG is the trustee and the audit report is reviewed by the Comptroller General of Canada before a final report is sent to the Prime Minister informing him that the administration of the frozen trusts in the ADRG's Office has been properly carried out.

7. Costs of Trust Arrangements

Payment of the costs of trusts is the subject of a new policy introduced in February 1982, applicable back to the date of issue of the latest set of guidelines -- the Guidelines for Ministers of the Crown of April 1980. This costs of trusts policy covers all types of trusts established to comply with conflict of interest guidelines under all sets of guidelines issued by the government.

Where a frozen trust is established with the ADRG, as mentioned earlier, there are no costs to be recovered, but when any form of trust is established with the assistance of lawyers, chartered accountants or other qualified advisors, establishment fees may be levied and the new policy provides that they will be reimbursed if the fees are reasonable. On occasion, the ADRG has disallowed some parts of claims as being unreasonable.

Costs for dismantling a trust are also payable. Experience with these has been very limited to date, but apparently no problems have been encountered.

The amount of administration and maintenance costs of trusts reimbursable is based on a formula whereby an annual amount of up to one-half of one per cent of the market value of the assets is eligible for payment. This means, since there is no minimum amount fixed for trust assets, that small trusts cost the settlor a good deal more than they can recover under the policy, whereas large trusts generate sufficient revenue to more than cover all such costs.

Treasury Board is currently examining the possibility of introducing a minimum fee so that there will be greater equity toward those who establish blind trusts with very small amounts. Should the frozen trust option be extended to exempt staff, for example, a number of the people who would otherwise have been poorly served by the policy for repayment of costs would probably opt for a frozen trust.

(c) Disclosure

As an alternative to divestment either through sale or use of a trust, the avenue of disclosure is available, with respect to certain types of property and interests for several categories of officials under the present guidelines.

As this relates to conflict of interest, the idea of disclosure is that making known to the public the nature and extent of one's assets and other interests is a sufficient safeguard to ensure that the official in question will act, and be constrained to act, in the public interest. Everyone will then know what the official's vested interests are, and can watch to ensure that he or she acts without acceding to any of these interests when making a decision. By the same token, those receiving advice from the official or hearing his or her comments will be able to appreciate his or her particular interest in the subject, since it will have been made known. Where necessary, these people would be prepared to discount the official's advice to some extent if they knew it pertained to a matter in which he or she had a private as well as public interest.

This general approach is followed in some ways in Canada, for instance in the legal requirement that members of municipal councils declare their interest in a matter on the council agenda, withdraw from the council table when the matter is under discussion, and refrain from voting on it. There are other examples. However, since discussions within Cabinet and among officials are secret, public disclosure of individual holdings of ministers and senior officals would not serve this same purpose.

Greater reliance on the disclosure method was adopted when, in December 1973, you announced, Prime Minister, that Cabinet ministers from that date forward would have available to them, as one of the several means for complying with the guidelines, the option of making a public declaration rather than divestment of certain assets that would not likely be a source of conflict.

There are two types of disclosure: confidential disclosure and public disclosure. The former occurs when a declaration is made to a designated official, revealing one's assets and interests, to enable that official to satisfy himself or herself that no conflict of interest occurs. That official in turn may then certify to others that the particular office holder, in respect of whom disclosure has been made on a confidential basis, is in compliance with the conflict of interest guidelines.

Public disclosure, as its name suggests, involves filing of declarations or reports in which assets and other interests are shown, but in this case the information is open for public inspection. Public declaration of holdings made in municipalities and in the House of Commons can reveal a conflict of interest or bias on the part of the municipal councillor or member of Parliament which can be taken into account during debate or voting on relevant issues. A second purpose of public disclosure is to reveal holdings of such a nature that they are unlikely to give rise to a conflict of interest but do not qualify as exempt assets. This is the purpose of the disclosure provision in the Guidelines for Ministers and Governor-in-Council Appointees. This option, in our view, might be enlarged without adding significantly to concerns about conflict of interest.

Internal confidential disclosure is inherent in supplemental departmental guidelines which require officials to reveal to their deputy ministers any personal interests that might involve a conflict of interest with their public duties, as a preliminary to action to minimize or remove the conflict. Internal disclosure is also inherent in the administration of frozen trusts and in certain aspects of the other responsibilities of the Assistant Deputy Registrar General.

The Ministers' and Governor-in-Council Appointees' Guidelines cover the topic of property which is subject to declaration or public disclosure fairly thoroughly. Both methods of confidential disclosure (as a means of ensuring compliance) and public disclosure (as a means of satisfying certain compliance requirements) are in use under the present régime.

(d) Disclosure Through "Government in the Sunshine" Laws

Disclosure is most routinely applied through procedures requiring public office holders to file statements or make declarations which reveal the nature and extent of financial and other private interests that could generate conflicting interests.

Another way the disclosure concept can be implemented, however, is through legal requirements for public business to be conducted in public -- especially where agencies of government are involved in deliberative procedures that lead to decisions such as granting or revoking licences, issuing permits of a special nature, and the like. This approach is popularly termed "government in the sunshine" in the United States which enacted the Government in the Sunshine Act in 1976. This means that procedures for decision-making which are open to public scrutiny can help ensure that decisions are made based on considerations of the public interest, rather than private interests or personal considerations. The purpose is to provide the public with information, while protecting the rights of individuals and the ability of the government to carry out its responsibilities. It is a law well within the tradition of disclosure which is a part of the American democratic instinct. The statutory intent is achieved through provisions for "open meetings" and rules governing "ex parte communications".

Government in the sunshine provisions are considered in the context of our review of conflict of interest policy, because such broad disclosure provisions can be an alternative or additional method for alleviating concerns people may have about vested interests that might be operating "behind the scene" when a tribunal decides to grant a licence, or a marketing board decides to alter quotas, or some similar decision-making procedure is followed. Development of appropriate sunshine laws for the Government of Canada might become an appropriate step following implementation of the Access to Information Act. Further measures to ensure that public business is conducted in public would perhaps increase public confidence in decision-making processes being conducted in the public interest. We would not envisage the application of sunshine legal procedures to most activities of government departments, but perhaps, to the operation of certain tribunals and agencies of the federal government. It is an idea that merits careful study which we recommend. At present, none of the provinces has enacted such legislation although we have been

told that a committee in Ontario may be considering the idea. However, we understand the federal Department of Justice is at the moment in the midst of an administrative law reform project, one of the aspects of which deals with procedures of tribunals and agencies, which will address ex parte communications and openness. The study we recommend could, therefore, most conveniently be carried out as part of this project by the Department of Justice.

If the Government should decide to consider more thoroughly whether to proceed with such provisions and then chose to implement them, they could be incorporated as part of the general program we are proposing in this report. There would be a need to add provisions regarding open meetings and ex parte communications for certain agencies and quasi-judicial tribunals. This could be done legally either by a single act (as at the federal level in the United States), or by specific amendments to the governing acts of those bodies to which the new rules for open decision-making are to apply. Depending on the timing of implementation, those amendments could be included in the Ethics in Government Act.

(e) Conclusion

The views of those who have been subject to various administrative arrangements for minimizing conflicts of interest are reported later in this report. At this stage, it is sufficient to observe that these techniques, however necessary they may be, are complex, involve serious financial and career problems for those who are required to follow them, ought to be administered with the utmost care and applied only where strictly necessary.

CHAPTER 7

HISTORY AND DEVELOPMENT OF THE FEDERAL CONFLICT OF INTEREST LAWS AND GUIDELINES

(a) Introduction: A Continuum of Rules Governing Ethical Conduct

The question of ethical conduct in the handling of matters of government has a long history. The dangers of being placed in an equivocal position in discharging one's official duties have long been recognized. Apart from religious and philosophical teachings about ethical conduct, the first efforts to address this subject in any formal manner in Canada found expression through provisions in the criminal law. This generally was the pattern in the English-speaking democracies through the eighteenth and nineteenth centuries, as provisions were added to statutes dealing with offences such as bribery, corruption, and fraud. A number of these provisions had earlier antecedents in parliamentary enactments in England which date back centuries. The criminal law provisions addressing flagrant abuses arising from conflicts of interest and improper conduct in public offices provide a backdrop to the conflict of interest rules.

The continuum of provisions is seen as starting with the extreme and severe sanctions found in the Criminal Code dealing with serious offences such as fraud, bribery and corrupt inducement of office holders; ranging through statutory provisions governing the conduct of those in public office and therefore still part of the law dealing with conflict problems but largely non-criminal in nature; and moving at the other end of the spectrum, to general statements or "codes" as to what is considered appropriate conduct.

(b) Expansion of Body of Laws and Rules Dealing with Conflict of Interest

For years, conflict of interest problems were addressed only by the criminal law, and by some procedural requirements about conduct of government employees in the acts which created their functions. Recently, as the nature and functions of government and office holders have changed, these rudimentary

provisions have been supplemented by the non-criminal laws referred to above. There are many examples (which are discussed fully in the next Chapter), such as section 32 of the Public Service Employment Act restricting partisan political activity by public servants and section 5(5) of the National Energy Board Act which prohibits members of the National Energy Board from owning shares or having interests in companies in the energy sector.

The most recent addition to this body of rules of conduct has been the practice of developing written "codes" designed to set the tone for one's conduct in public office and to establish procedures for preventing and resolving conflicts of interest.

It is this last development which has given rise to "guidelines". Some would see this process as little more than an effort to express in writing the "unwritten code of conduct" that directed men and women in earlier and simpler times. Although conflict of interest guidelines were not addressed in depth at the federal level in Canada until the late 1960s and were only reflected in actual Orders-in-Council in the early and mid-1970s, initiatives in this area date back to the 1920s, when the first Order-in-Council on this subject was passed to prevent civil servants from "moon-lighting" - the age old problem of serving two masters - which today is termed "outside employment".

Our terms of reference do not include examination of the conflict of interest rules which govern members of the House of Commons and members of the Senate. There are a number of statutory provisions in this realm, such as those found in the Criminal Code and the Senate and the House of Commons Act, as supplemented by some conflict of interest strictures in the Standing Orders of the House. Together they establish a legal framework for matters of ethical conduct within which the broad range of permitted activities by parliamentarians can take place.

Nevertheless, we do take note of several provisions of general application to members of Parliament and senators, because we are required under our terms of reference to consider the position of cabinet ministers and parliamentary secretaries. Since they are appointed from the membership of the House of Commons or the Senate, the rules of ethical conduct for members of Parliament can be seen as establishing a basic minimum of rules, upon which the further guidelines established for cabinet ministers and parliamentary secretaries have been built.

(c) Early Statutory Provisions Affecting the Public Service

The Civil Service Amendment Act of 1908 was a first step in eliminating the evils of patronage, through application of the merit principle to the "inside service" (civil servants in Ottawa)

and imposition of the penalty of dismissal for political activity. Professor Kenneth Kernaghan notes that patronage in the "outside service" (civil servants outside Ottawa) continued apace, and the device of making temporary appointments on political grounds to the inside service almost destroyed the merit system in the decade after 1908.[1]

The Civil Service Act (1918) reinforced the prohibition against political activity, by vesting exclusive power of appointment and promotion in the Civil Service Commission rather than in politicians. Section 55 of the Act, which stood unaltered until 1961, stipulated that civil servants were not to engage in partisan work in connection with a federal or provincial election. Nor were they permitted to contribute, receive or deal in any way with money for party funds. The penalty for violating this provision was dismissal.

(d) Orders-in-Council Governing Conflicts of Interest: The Incrementalist Approach

In 1925, the first Order-in-Council (PC 360) was passed to deal with a conflict of interest problem. It directed, quite simply, that if employees were discovered to be selling goods or engaging in trading of any kind during working hours, they could be suspended or dismissed by the deputy head.

Thus began the incrementalist approach to conflict of interest issues. Rather than a general, all-encompassing statement about the appropriate standards of conduct by government employees and officials, specific rules were made as and when a problem arose. This piecemeal approach was within the British tradition of gradualism, of dealing with problems only when they generated enough concern to warrant serious attention, at which point a tailor-made solution would be devised.

In this pattern, another Order-in-Council (PC 1802) appeared on August 7, 1931, stating that, due to the unemployment problem, employees were not permitted to use their annual leave to engage in temporary employment at race tracks, exhibitions, or in the selling of goods of any kind. Alleged breaches of this rule were subject to suspension, investigation and appropriate discipline. Eight years later, this Order-in-Council was rescinded, as part of a review of existing rules by

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1. "The Political Rights and Activities of Canadian Public Servants," in Kenneth Kernaghan, ed., Public Administration in Canada (Toronto: Methuen, 2nd ed; 1971), p. 386.

Order-in-Council PC 1/1803. In its place, a more generalized provision, Order-in-Council PC 71/751 was passed on March 29, 1939, stipulating that employees were not to engage in outside employment where their salary was in excess of $1,200, except where authorized by the Treasury Board.

To clarify matters, a further Order-in-Council (PC 1803) was passed on July 8, 1939, which rescinded the 1931 Order dealing with temporary work at the race tracks, etc. (PC 1802) and indicated that such outside employment would thenceforth be subject to the provisions of the recent new rule contained in PC 71/751. Three years later, on August 19, 1942, PC 128/7359 was passed which suspended PC 71/751 and empowered deputy heads to authorize outside employment. On August 27, 1947, Order-in-Council PC 192/3465, stipulating that employees making up to $1,600 annually could engage in outside employment, superseded PC 71/751.

During the early 1930s, there were some concerns about public servants participating in active politics at the municipal level. An Order-in-Council (PC 95) was passed on January 16, 1932, setting down the rule that public servants not do so unless they had been granted leave without pay for the period of office. This was amended (by PC 2463) on November 7, 1932 so that, at the discretion of the minister, public servants could accept a municipal office providing the money paid to them did not exceed $500 per annum. Order-in-Council PC 95 was amended again on April 8, 1948 (by PC 1380) to increase the ceiling amount which federal public servants could earn as municipal elected officials to $900. This amount was increased in 1955 to $1,000 (by PC 1955-717) and in 1958 to $1,500 (by PC 1958-1568). Each of the last four amendments included the proviso that the municipal position must not interfere with the performance of the employee's regular duties.

Following the 1930s' initiatives, there was a period of quiet until March 21, 1951, when Order-in-Council PC 3/1440 was passed dealing with government employees engaging in employment outside of their regular duties. In brief, it promulgated these rules:

- employees who wished to have dual employment with the government could do so only with the permission of the Treasury Board;
- outside employment could not be of a nature that would be in conflict with the government's work nor could it be politically partisan; and
- deputy heads were given the authority to limit or terminate the outside employment of an employee in cases

where it was considered that the employee was either prevented from carrying out his duties or impaired in his efficiency in the public service.

This Order-in-Council remained in effect until December 18, 1973, when it was revoked by Order-in-Council PC 1973-4064. On this date the Public Servants' Conflict of Interest Guidelines (PC 1973-4065) were approved and tabled by the Prime Minister in the House of Commons.

(e) Rulings Clarifying Applicat on of Rules Governing Ethical Conduct

In the 1950s, a common-sense ruling clarified a principle regarding remuneration received from departmentally approved outside employment. It serves as an example of how rulings from time to time fleshed out the meaning and application of the rules governing ethical conduct. In 1957, Auditor General Watson Sellar wrote to Deputy Minister of Finance K.W. Taylor, requesting direction on the handling of a case where an employee received an honorarium from a private firm for having participated in an activity outside his regular duties. The employee had permission from the department to participate and also had his travelling expenses paid by the department. Mr. Sellar wished to know what should happen to the money which had now been received from the company; it was decided that the employee should reimburse the department for the expenses.

(f) 1960s Review of Conflict of Interest Policies

By 1960, the time had arrived to reconsider some of the rules limiting the political activity of public servants. On August 12, 1960, Order-in-Council PC 1960-1121 was passed which revoked Order-in-Council PC 95 as amended. Thus the specifically tailored provisions about participation in municipal politics as an elected representative were gone.

The effect of patronage on appointments to positions falling under the Civil Service Commission had dwindled and by then 131,953 persons out of a total civilian public service of 344,362 were subject to the restrictions on political activity. While acceptance of the merit principle by exempt groups varied from one agency to another, political appointments and partisan activities were more common in agencies not covered under the Civil Service Act.

The revised Civil Service Act of 1961 retained the prohibition against partisan work and incorporated the recommendation of the Report of the Civil Service Commission on Personnel Administration in the Public Service made in December 1958 by the Chairman of the Commission, Mr. A.D.P. Heeney. The

key concept of the Heeney recommendation implemented in the Civil Service Act (1961) was the provision of an inquiry before dismissal. Prior to 1961, no inquiry process existed. The text of the relevant section of the 1961 Act is as follows:

Political Partisanship

61. (1) No deputy head or employee shall

(a) engage in partisan work in connection with any election for the election of a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories; or

(b) contribute, receive or in any way deal with any money for the funds of any political party.

(2) Every person who violates subsection (1) is liable to be dismissed.

(3) No person shall be dismissed for a violation of subsection (1) unless the alleged violator has been given an opportunity of being heard, personally or through his representative.

This recommendation suggested that charges of political partisanship in violation of any of the stipulated provisions could be laid by any person in writing to a minister of the Crown, supported by an affidavit. Once this was done, the employee in question was to be suspended pending the results of an enquiry by the Minister of Justice. If found guilty, he or she was to be dismissed; and if innocent, he or she was to be reinstated with no loss of pay.

On November 30, 1964, Prime Minister Pearson wrote to his Cabinet ministers emphasizing the importance of maintaining high standards of conduct and the need for their staff to maintain the same high standards. The areas covered by that letter form the basis of the main principles of the guidelines in use today. In fact, one of the paragraphs in the Prime Minister's letter has been used almost verbatim in the current Public Servants' Guidelines:

> It is by no means sufficient for a person in the office of a Minister - or in any other position of responsibility in the public service - to act within the law. That goes without saying. Much more is required. There is an obligation not simply to observe the law but to act

> in a manner so scrupulous that it will bear the closest public scrutiny. The conduct of public business must be beyond question in terms of moral standards, objectivity and equality of treatment.

Mr. Pearson also warned against:

- giving preferential treatment to persons on the grounds of personal acquaintance or sympathy;
- ministers and their staff placing themselves in a position where they might be under obligation to anyone who might profit from special consideration or who might seek special treatment;
- having a pecuniary interest that could conflict with official duties; and
- using official information for personal gain.

As Professor Kernaghan has pointed out:

> Despite this letter, which became known as Mr. Pearson's "Code of Ethics", scandals subsequently erupted which led to the resignation of Cabinet Ministers, legislators and ministerial assistants. Popular interest in the ethical conduct of public officials subsided during 1967, however, and no action was taken in response to suggestions that a more formal code of ethics be formulated and that it apply to public servants as well as elected officials.[2]

In 1967, when the Public Service Employment Act was passed, it required that employees wishing to participate in provincial and federal politics obtain a leave of absence from the public service. Leave could be refused if it was considered that the employee's future usefulness to the public service might be impaired by such participation. The Act also prohibited other types of political activity such as working for or against a

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2. Kenneth Kernaghan, "The Ethical Conduct of Canadian Public Servants," Optimum, 4, No. 3 (1973), p.6.

candidate in a provincial or federal election. Participation in municipal politics by public servants was a matter which continued to be dealt with by the Treasury Board.

The significance of the Public Service Employment Act (1967) as it relates to the political activity of employees lies not in the fact that restrictions are set out, but rather in the granting of additional rights, namely to run for office and to make financial contributions. In terms of prohibitions, the principle and universal prohibition addresses the issue of working for, on behalf of or against a candidate or political party.

In terms of the granting of leaves of absence, a leave of absence is only granted by the Commission in the instance where the employee wishes either to stand for nomination or run for office. There is no provision for the Commission to grant leaves of absence for any other purpose related to political activity.

On October 2, 1967, Mr. O.G. Stoner, then Deputy Secretary of the Privy Council Office, wrote to the Prime Minister indicating that he felt that the controls for conflict of interest were "haphazard" in comparison to those in the United Kingdom and the United States. It was suggested that the Prime Minister request the President of the Treasury Board to establish general regulations.

The Prime Minister agreed and Mr. Robertson, then Clerk of the Privy Council, wrote to the Secretary of the Treasury Board, on January 11, 1968, asking him to undertake a study and develop a system of guidelines. As a result, Treasury Board issued guidelines in 1969 relating to discipline in regard to conflicts of interest.

On July 15, 1968, Mr. Robertson raised with the Prime Minister the question of the arrangements ministers should make to avoid any conflicts of interest arising out of corporate connections or financial arrangements. In particular, he referred to the Manual of Official Procedure, page 350, which stated:

> No conflict should exist or appear to exist between a minister's private interests and his public duties. Upon appointment to ministerial office he is therefore expected to arrange his private business in a manner that will prevent conflicts of interest from arising. This may mean the abandonment of certain company directorships.

Cabinet agreed to discuss the basic principles for the avoidance of conflicts of interest and, in September 1968, the President of the Privy Council was assigned responsibility for

reviewing the issue of conflict of interest. Two research papers on this subject were prepared for the President of the Privy Council, one by Professor Jeremy Williams of the University of Alberta and the other by Professor Yvon Marcoux of Laval University. The Williams paper was submitted in September 1969, and the Marcoux paper in June 1970; they were subsequently tabled in the House of Commons.

Recognizing that conflicts of interest are "infinitely various", Williams stressed the need to limit the breadth of the term, "so that only personal and immediate pecuniary interests can be said to give rise to conflicts." Such a limitation he considered to be the appropriate point at which to define the balance between public benefit and individual advantage.

He pointed to those dangers which may result from actual or apparent conflicts of interest, stating that "it depends very largely on the surrounding circumstances as to whether actual or apparent conflicts of interest are acceptable or are evils to be struck at by legislation or other appropriate device." A distinction was made between public servants, legislators and Cabinet ministers; he stated that beyond "laying down certain basic rules for these persons, it will be better to let them be guided by their own ethics and conscience." Further, he suggested, this field of conflict of interest "may well prove to be incapable of regulation," reflecting his view that the "circumstances of the case may vary greatly with the type of position involved and the type and magnitude of the interest."

Williams set out certain "cardinal rules" designed to prevent the most obvious and objectionable forms of conflicts and formulated "secondary" rules which did not reduce the need to observe the spirit as well as the letter of any rules promulgated. Pointing out that general responsibility is placed on the individual in the first place, he outlined enforcement remedies including criminal punishment, reprimand, removal, invalidation (of decision of influenced individual), and divestment of interest. He concluded that it was unlikely that conflict problems could be resolved by the formulation of rules. Instead, he said, it would be necessary for the letter and spirit of certain principles to be observed. These principles would vary according to the position and the situation. One of his final statements was: "The solution appears to be to give a tribunal some discretion within clearly defined limits."

Professor Yvon Marcoux advocated an approach similar to that of Professor Williams. Marcoux summarized studies on the question of conflict of interest and suggested areas for additional research prior to the formulation of definite proposals. He stated that the importance of regulating conflict

of interest "increases with the government's ever-expanding intervention in a variety of fields of activity." His reasons for such control paralleled those of Professor Williams. They are: (1) to ensure the efficiency of government administration; (2) to guarantee equal and impartial treatment of all citizens; (3) to prevent a person holding public office from using information acquired in the discharge of his or her duties in order to promote his or her own personal interests; and (4) to maintain the integrity of parliamentary and governmental institutions, in order to inspire the public's respect and retain its confidence.

He recommended the appointment of special Commons and Senate Committees to look into the drafting of a code of ethics and rules respecting disclosure of financial interests for MPs and Senators. Ministers would have to meet "special requirements" beyond those applying to other parliamentarians. With respect to members of regulatory bodies, Marcoux stated that the government should adopt a policy of including in the constituting statutes of all such bodies, provisions that restrict their members from having direct or indirect interests in enterprises or activities in the field subject to their regulation.

Finally, Marcoux recommended that the report of the New York City Bar Association's Special Committee on Congressional Ethics be adopted for federal parliamentarians. The report contains a proposed model code of conduct and rules concerning disclosure of financial interests.

(g) The 1970s: A Decade of Establishing Written Guidelines for Ethical Conduct, Considering the Position of Parliamentarians and Revising Political Activity Rules for Public Servants

All the contemplation of the problem during the 1960s led to action in the 1970s when written guidelines of a comprehensive nature appeared.

The Williams and Marcoux papers became, to a degree, working documents for an Interdepartmental Committee established in April 1970 at the request of Mr. Robertson, Clerk of the Privy Council. This Committee, chaired by Mr. Jean Boucher, Deputy Minister of Supply and Services, and comprised of deputy heads from the departments and agencies most directly concerned with the conflict of interest topic, was instructed to develop an approach to regulating conflict of interest for public servants. The final report of the Committee was submitted to the President of the Privy Council in March, 1972.

Noting that up until that time tradition had kept conflict of interest problems to a minimum in the public service, the Committee nevertheless stated that "a more explicit system" was required if this good record was to be maintained. In general

terms, the Committee agreed that such a system would provide public servants with a more specific idea of what was expected of them, give their superiors a clearer basis from which to judge or direct the conduct of their employees, and inspire greater trust and confidence on the part of the public. The Committee proposed a set of specific, "minimum rules" to apply, in principle, to all public officials, including persons appointed by Governor-in-Council and members of the Armed Forces and the Royal Canadian Mounted Police. These rules also could be adopted for the staff of Crown corporations.

The Committee identified ten broad areas of potential conflict which are still of concern today. The "overriding principle" identified by the Committee was that "a public official, in the performance of his duties, should serve the public interest and where he is faced with a choice between his personal interests (or any other interest) and his public duties, he must choose the latter." In addition, the Committee concluded that:

- a set of rules was required which, without being excessively detailed, would provide meaningful guidance for public officials;

- the application of any code of rules regarding conflicts of interest should take into account the nature and extent of the responsibilities of the public official, and his or her private interests which happen to be in potential conflict with the public interest;

- the rules should call for public officials to disclose potential or actual conflicts, before their appointment, to the appointing authority and after appointment, to their superiors so that, where appropriate and feasible, the personal interests could be retained and an official decision made regarding the manner in which the conflict was to be controlled or merely recorded;

- the post-employment problems it was felt could not be dealt with effectively in rules intended to bind public officials only. But since this was an important problem, the Committee recommended that a government statement be made on the subject, preferably at a time when it was not a public issue;

- taking into account the infrequency of incidents of this nature, it would be unwise to attempt to fix a rule beyond the provisions of the Public Service Employment Act concerning the right of public servants to participate in political activities; and

- the rules must refer specifically to the improper use of confidential information since this is a major source of conflicts of interest.

The conclusion of the paper was that it was timely for the Government to adopt a set of rules on conflict of interest in the public service and that a minimum code could be developed and applied. Treasury Board should administer the code for the public service but the system should extend to "as many public officials and servants of the State as possible."

Professor Kernaghan has written that,

> During 1972, widespread public interest in the ethical standards of public officials was rekindled by vigorous mass media coverage of alleged conflicts of interest involving Ontario Cabinet ministers and resulting in a minister's resignation. Also, in the summer of 1972, two senior public servants in the Department of Regional Economic Expansion were suspended for allegedly "authorizing an incentives grant to a company in which they had a direct financial interest by holding shares in it".
>
> It was clear from discussion of these incidents that both the general public and legislators were confused and in disagreement as to what kinds of activity constituted conflicts of interest. Some guidelines or rules of conduct were required.[3]

In the Speech from the Throne, on January 4, 1973, the Governor General announced that proposals dealing with conflicts of interest as they may affect members of Parliament, ministers of the Crown and public servants would be brought before the House. On January 8, 1973 the Government gave notice in the House of Commons of its intent to establish regulations for three possible categories of conflict of interest.

Beginning in 1973 there was an increase in interest in the subject of conflict of interest as it related to members of

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3. Kenneth Kernaghan, ibid., p.8.

the House of Commons and the Senate. On January 7, 1973, Mr. Stanley Knowles (MP Winnipeg-North Centre) introduced Bill C-38 in the Commons, dealing with disclosure of financial interests by senators and members of the House of Commons. The Bill was reintroduced in the next session as Bill C-158 but was not given second reading. Also, in answer to a specific query in the House, Prime Minister, on June 8, 1973, you said that "an effort will be made by the Government to reconcile the very real desire of the people of Canada to have people of eminence in their service, with the important principle of avoiding a conflict of interest situation where such a person would serve his own personal interest in serving the public."

Several other studies and suggestions were received by the Privy Council Office. A sequence for dealing with the various proposals was suggested. A distinction was drawn between ministers, members of Parliament and Governor-in-Council appointees on the one hand, and public servants on the other. The former group was said to have fiduciary responsibilities while the latter was treated as being in a master-servant relationship. This distinction was considered unsatisfactory in that it was hard to see a systematic and coherent application or to envision a suitable public policy based upon it.

As Professor Kernaghan relates:

> Most of the events recounted to this point have involved elected officials rather than public servants. Actually, very few instances of unethical conduct by public servants have come to public light - in part because there appears to be relatively few cases and in part because discipline in such cases is handled within the public service unless the offence is grave enough to fall within the jurisdiction of the regular courts. The publicity given to conflict of interest problems involving elected officials has, however, had a "spillover effect" on the status of public servants. There is a logical progression from concern about Cabinet ministers to concern about their deputy ministers who have access to much confidential information and who are extremely influential in the policy process. It follows also

> that guidelines should be set out for other public servants whose positions might involve them in ethical problems.[4]

By 1973, Cabinet had adopted the basic principle taken from Prime Minister Pearson's letter on the subject to Cabinet Ministers in 1964. It is this statement which provided the basis for the current Public Servants' Guidelines and, by reference, those for Governor-in-Council appointees. In mid-1973, four memoranda on the subject of conflict of interest were considered, which related to ministers, members of the House of Commons, Governor-in-Council appointees and public servants.

In July 1973, the Honourable Allan MacEachen, President of the Privy Council, tabled a Green Paper entitled Members of Parliament and Conflict of Interest. The paper included a draft Independence of Parliament Act which was to apply to members of the Senate and House of Commons. The purpose of the Act was to ensure that the independence of parliamentarians in the performance of their duties was not affected by their private interests. Mr. MacEachen stated in the House, "Members and Senators are trustees of public confidence who must perform, and appear to perform, their duties in a manner reflecting the highest degree of concern for the public interest."

Also in July, 1973, Prime Minister, you made a statement in the Commons regarding conflict of interest explaining the requirement for ministers to resign directorships in commercial corporations and positions on certain boards, and to sever all business, commercial and professional associations while they were cabinet ministers. The requirement was outlined for them to arrange their personal holdings in a way that would prevent conflicts from arising and the blind and frozen trust options available for this purpose were explained. Much of this had been the policy of the government for several years, and reference was made to giving up directorships and placing assets at arm's length as early as August 1968. It was indicated that these rules would be put in the form of guidelines as soon as Parliament had a chance to consider the Green Paper.

On December 18, 1973, Prime Minister, in announcing the government's policy, you stated that it clarified for the public service "responsibilities which, although they are not new or additional to the traditional one long understood by Public Servants require restatement and formal publication." You said that it "is as much a benefit to the employee as it is to the employer to have clear standards apply," and reiterated the belief

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4. Ibid.

that "in setting standards, it is important not only to protect the public interest adequately, but also to protect the rights of those who are affected by the standards." You announced that ministers would have another option for dealing with non-personal property besides total divestment by sale, or the use of a blind or frozen trust, namely public declaration of certain assets that would not likely be a source of conflict. Additional types of property that could be considered as exempt were also announced.

You said that Governor-in-Council appointees should also be provided with guidelines and that they would be expected to adhere to standards similar to those for Cabinet ministers. It was indicated that there would be a set of standards and procedures for employees of Parliament, and that this subject should be referred to the Commissioners for Internal Economy for employees of the Senate. To date, no standards or guidelines for this group have been produced.

At this time, it was announced that Crown corporations and agencies would be encouraged to develop standards and procedures appropriate to their own organizations and to apply them. Shortly thereafter, on December 28, 1973, you wrote a letter to Cabinet ministers outlining the procedures they must follow to avoid certain activities which could be a potential source of conflict and explaining the details of the public declaration option.

On December 31, 1973, the Secretary of the Treasury Board wrote deputy heads advising them of the application of conflict of interest guidelines to the public service and emphasizing the need for all public servants to comply with them. Departments were encouraged to expand on the guidelines so as to adapt them to their special circumstances. This circular contained what seems to have been the first directive regarding the non-acceptance of gifts that could bring suspicion upon the public servant's objectivity.

In May and June of 1974, the Office of the Assistant Deputy Registrar General was established to administer the guidelines for ministers, their exempt staff and Governor-in-Council appointees. On November 8, 1974, Conflict of Interest Guidelines for Persons Appointed to Public Office by the Governor-in-Council came into effect, stating that Governor-in-Council appointees must adhere to the specific provisions contained in the guidelines, and that they must also adhere to the Public Servants Guidelines as a minimum. When these guidelines were introduced, it was decided to apply them initially only to certain senior officials and then, gradually, to bring more categories of Governor-in-Council appointments under their protection.

In June 1975, you wrote, Prime Minister, to all Lieutenant-Governors asking them to comply with three special guidelines which were similar to the Governor-in-Council Guidelines. In 1978, the application of the guidelines was extended to cover high commissioners and ambassadors and was subsequently applied to all heads of post. The Governor-in-Council Guidelines do not and never were intended to apply to part-time Governor-in-Council appointees.

The Green Paper was retabled on November 27, 1974, and was referred to the Standing Committee on Privileges and Elections. On April 9 of the next year, it was retabled in the Senate. In 1975 and 1976 the House Standing Committee on Privileges and Elections and the Senate Standing Committee on Legal and Constitutional Affairs submitted their reports on the Green Paper. Neither was debated in the House of Commons or the Senate.

On November 20, 1975, special guidelines were approved for ministers' exempt staff. These have since become defunct and exempt staff are now subject to either the Ministers' Guidelines or the Public Servants' Guidelines. It is normally expected that executive assistants and senior policy advisors will be subject to the Ministers' Guidelines; other exempt staff are subject to one of the two régimes, according to the discretion of the minister.

The Independence of Parliament Act, Bill C-62, was introduced and given first reading in the House on June 26, 1978. The Bill died on the order paper when the session ended on October 10, 1978. On October 16, the Bill was reintroduced with revisions as Bill C-6, An Act Respecting the Independence of Parliament and Conflicts of Interest of Senators and Members of the House of Commons and to amend certain other acts. On March 8, 1979, the Bill was given second reading and referred to the Standing Committee on Privileges and Elections but died on the order paper when the session ended on March 26, 1979.

On August 1, 1979, Prime Minister Clark introduced new Conflict of Interest Guidelines for Ministers. Five significant departures were made from the previous guidelines:

- The guidelines were made to apply to spouses and dependent children of ministers, as well as to ministers themselves, in order to ensure that assets of the entire family unit were covered.

- Ministers could no longer place assets in a 'frozen trust', a device under which the beneficiary may not control the assets but continues to know what those assets are.

- Assets which had to be sold or placed in a blind trust were defined to include large amounts of foreign currencies, and larger loans to persons outside the minister's family.

- Rules for blind trusts were expanded. Those acting as trustees had to include a government-designated trustee, chosen from among a list of recognized trust companies, who would be particularly responsible for ensuring that operation of the trust met the guidelines and who, in that role, would have the conclusive vote in any decision of the trustees.

- Gifts of a value exceeding $100 received by a minister or family member from someone outside the family had to be disclosed within 30 days.

The rules for ministers outlined in your letter, Prime Minister, of December 28, 1973 were classified as confidential, on the basis that they formed part of a Cabinet document. It seems strange that rules governing how Cabinet ministers had to deal with conflicts of interest should have remained secret - especially in light of the interest in fostering a public perception that such matters are being satisfactorily dealt with. The Ministers' Guidelines were made public on August 7, 1979.

(h) The Development of Approaches to the Post-Employment Activities of Public Office Holders

Several early studies conducted in the area of conflict of interest identified the need for the government to consider post-employment activities as a potential area of conflict, namely the Williams paper, the Marcoux paper, Report of the Interdepartmental Committee on Conflict of Interest (1972) and several Cabinet documents.

A number of problems surfaced in this area. A study was undertaken in the Privy Council Office in 1975-76 of the need for formulating government policy regarding the post-employment activities of former public servants. The policies of other governments were examined and the study found that policies of a differing nature and approach existed in the United Kingdom and the United States. The problems potentially caused by the activities of former public servants were analyzed, and effective and equitable means of dealing with the issue were considered. It was concluded that it was in the best interests of the government, the public and government employees to adopt a clear and coherent policy on this subject.

In March and April of 1976, concern was expressed in Parliament and in the press regarding the commercial activities of

two former deputy ministers (the "Reisman-Grandy situation"). At that time, Prime Minister, you indicated to the House of Commons that the government was concerned about certain practices of former public servants and that the matter was being studied with a view to producing guidelines in the near future. The adoption of certain principles was considered, which would restrict the ability of former government employees to (1) accept employment with firms with which they have had an official working relationship; (2) change sides to represent or aid commercial corporations with respect to matters which were dealt with by, or were under the jurisdiction of, former public servants while they were employed by the government; and (3) lobby or give advice concerning departments or agencies of government with which the former public servants were employed or had a close working relationship.

It was deemed important that the government provide to the public and to public servants a concrete indication of the standards expected of former government employees. This consideration supported the formulation of specific principles. The adoption of principles, the application of which would be determined as necessary by an advisory body, also seemed to afford the most flexibility in the implementation of the policy and its modification at a later date. On October 7, 1976, the Cabinet adopted the principles and the policy.

You wrote to your Cabinet ministers on October 8, 1976, to request that they and those under their authority comply with the spirit of the policy and guidelines until steps could be taken to complete the implementation of the program. Appendices I-V were attached to your letter, which are referred to as the Post-Employment Guidelines and which were tabled in the House of Commons on December 17, 1976. On February 14, 1977, you confirmed that Appendix IV of the Post-Employment Guidelines, which dealt with administrative arrangements, would be extended to apply to members of the Armed Forces and the Royal Canadian Mounted Police.

On December 29, 1977, Cabinet ministers were advised that the Post-Employment Guidelines would come into force on January 1, 1978. It was indicated that the Post-Employment Guidelines were to apply to ministers, ministers' exempt staff, parliamentary secretaries, Governor-in-Council appointees and public servants at and above the SX-1 level. Although the application of the Post-Employment Guidelines was not retroactive and therefore did not apply to ministers already in office, all ministers were asked to continue to be guided by them as a matter of honour and personal choice. The 1976 version of the Post-Employment Guidelines had indicated that they were to be a "condition of employment" but this requirement was changed to "honor and personal choice" in the 1977 version. A number of ministers in that government, because they were appointed prior to

that date, were not required to observe the Post-Employment Guidelines until they were reappointed as ministers, two elections later. Amended Post-Employment Guidelines were tabled in the House on April 24, 1978. This amended version is the one in use today for public servants and Governor-in-Council appointees.

Modifications to the Post-Employment Guidelines were distributed on August 1, 1979 to Cabinet ministers as a régime specifically for them. This group was thus removed from the umbrella of the universal Post-Employment Guidelines. These Post-Employment Guidelines were adopted on April 28, 1980 by the new government of Prime Minister Trudeau, with some minor grammatical changes. They were issued to all Cabinet ministers on April 28, 1980 and were tabled in the House on May 1, 1980.

At that time, the Post-Employment Guidelines for Ministers were modified to apply to parliamentary secretaries. Although there were some changes in wording, and the cooling-off periods were reduced, the substance remained the same. Parliamentary secretaries had previously been subject to the universal set of Post-Employment Guidelines. Parliamentary secretaries were advised on April 29, 1980 that they would be required to observe the Post Employment Guidelines and a copy of the guidelines was attached to each letter.

On April 30, 1980, you advised Cabinet ministers that designated exempt staff members (at least executive assistants and senior policy advisors) should thenceforth be subject to the Ministers' Guidelines.

In summary, the current situation is that there are three sets of Post-Employment Guidelines in use:

1. Post-Employment Guidelines applicable to public servants and Governor-in-Council appointees;

2. Post-Employment Guidelines for Parliamentary Secretaries applicable to parliamentary secretaries; and

3. Post-Employment Guidelines for Ministers applicable to ministers and designated ministers' exempt staff.

(i) Into the 1980s: Refinements to Existing Guidelines and a Major Policy Review

Conflict of interest and post-employment guidelines for ministers, being the prerogative of the Prime Minister, are subject to change when the government changes. Changes were made for the Government of Joseph Clark, and further changes were made

by you Prime Minister, in 1980. The Ministers' Guidelines were modified in three ways:

- the clause regarding spouses and dependent children was removed, although it was stated that ministers must not transfer their holdings to their spouses or dependent children as a means of avoiding application of the guidelines.

- retention trusts were introduced. This form of trust protected the rights of the minister as a consequence of other arrangements intended for estate planning purposes. All moneys earned were required to be put back into the trust.

- further provisos regarding the care that had to be taken with conflict of interest matters were added.

The new guidelines, dated April 28, 1980 were tabled in the House and the subject of a press release on May 1, 1980. Cabinet ministers were requested to abide by them, as were parliamentary secretaries and ministers' exempt staff.

Late in 1981, the Secretary of the Treasury Board initiated a review of departmental and agency experience in the application and administration of the Conflict of Interest and Post-Employment Guidelines. The review confirmed the existence of wide variations in departmental approaches and the subsequent report recommended ways of providing some measure of consistency. Note was taken of concerns expressed by some officials about the Post-Employment Policy and Guidelines.

In February 1982, Treasury Board agreed that the costs of establishing and maintaining trusts to comply with the guidelines would be paid by the government. The annual limit on the amount paid is one-half of one per cent of the market value of the assets being administered for any one individual.

On March 30, 1983, the late Honourable Walter Baker introduced Bill C-679, An Act Respecting Standards of Conduct for Public Officers and on November 29th, Mr. Howard Crosby, Member of Parliament for Halifax West introduced Bill C-700, An Act to Provide for the Control of Conflicts of Interest in Government Affairs. It was reintroduced on December 19, 1983 as Bill C-208. Such Private Members' Bills are representative of the concern about policy and procedures governing conflict of interest situations which is raised from time to time by parliamentarians.

Three sets of conflict of interest guidelines are currently in existence.

1. Public Servants Guidelines applicable to public servants, Governor-in-Council appointees, and some ministers' exempt staff.

2. Governor-in-Council Guidelines applicable to full time Governor-in-Council appointees at and above the EX-1 level.

3. Ministers Guidelines applicable to ministers, and designated ministers' exempt staff.

There are also the basic principles to which parliamentary secretaries are expected to adhere, which are set out in a letter but are not in the form of guidelines. The rules applicable to Lieutenant Governors are included in an exchange of letters.

A major development in this area was, the appointment on July 7, 1983, of our Task Force on Conflict of Interest to review in a major way all of these policies and procedures as they have evolved and to consider whether new approaches should be devised at this stage of our history.

CHAPTER 8

SYNOPSIS OF THE PRESENT FEDERAL CONFLICT OF INTEREST LAWS, GUIDELINES AND POLICY

The following synopsis of the present federal conflict of interest laws, guidelines, and policies will provide a basis for understanding comments and recommendations elsewhere in this report. The complete texts of the laws, guidelines and policies referred to in this chapter can be found in Appendix C.

(a) Criminal Code Provisions

1. Section 108 - Bribery

Section 108 of the Criminal Code provides that no judicial office-holder or member of Parliament or a legislature may accept or obtain, agree to accept or obtain, or attempt to obtain, money or any kind of preferential consideration for himself or herself or anyone else in a corrupt manner. Nor may individuals give or offer corruptly such money or favours to judicial office-holders or members of Parliament or a legislature. The penalty for this offence is imprisonment up to 14 years.

2. Section 110 - Frauds Upon the Government (Gifts)

Persons are prohibited by section 110 of the Code from making or accepting any bribes in connection with the functioning of government. Officials and employees of government are further prohibited from soliciting or accepting gifts (unless they have the consent in writing of the head of the branch of government that employs him or of which he is an official) from anyone who has dealings with the government. The penalty for these offences is imprisonment up to five years.

3. Section 297 - Refusing to Deliver Property

Anyone who is entrusted with government property for the purpose of delivering it, and refuses to do so upon request, is liable by virtue of section 297 of the Code, to imprisonment for 14 years.

4. Section 357 - False Return by a Public Officer

Anyone authorized to deal with public revenues who knowingly makes a false statement or return is liable to imprisonment for five years, section 357 of the Code stipulates.

5. Section 682 - Disability to Contract and Removal of Disability

Section 682 provides that persons convicted under section 110 may not contract with the government from that point on unless they have received a dispensation from the Governor-in-Council or unless the conviction has been set aside.

(b) Criminal Type Offences in Other Statutes

A number of Acts pertaining to the work of the government contain specific clauses on activities which are prohibited. In some cases, the penalty for not observing such clauses is indicated in the Act. Four examples are the Immigration Act, the Financial Administration Act, the Unemployment Insurance Act, and the Income Tax Act.

1. Immigration Act

Immigration officers and adjudicators who make false statements, participate in bribes, contravene the Immigration Act, or contribute to its contravention, are subject to a heavy fine and a jail term if convicted. The same holds true for anyone impeding the work of or impersonating an immigration officer or adjudicator. In addition, any person who contravenes the Act in any way commits an indictable offence.

2. Financial Administration Act

It is an offence punishable by fine and imprisonment for persons responsible for receiving public money to receive unauthorized money; to participate in any fraud on Her Majesty; to permit any violation of the law; to falsify any certificate, return or entry in any book; to fail to report any known violation of any revenue law; and to demand or accept any money or thing of value for the settlement of any charge of violation of the law. It is also an offence for anyone to bribe any person dealing with public money and for any person to accept or receive such a bribe.

3. Unemployment Insurance Act - Part V

Information obtained under the Unemployment Insurance Act is confidential and is not to be revealed unless required in

accordance with the enforcement or interpretation of the Act. Persons contravening the Act are guilty of an offence punishable by a fine, a jail term, or both.

4. Income Tax Act - Part XV

No person may, without authorization, communicate any information or allow access to any information obtained under the Income Tax Act. Contravention of this stricture is an offence punishable by a fine, imprisonment or both, pursuant to section 241(9).

(c) Civil Liability Under Certain Statutes

There are other statutes of a similar nature, whose penalties involve civil liability rather than criminal sanctions. For example, under the Financial Administration Act, Part XI, employees can be held accountable and can be held financially responsible for money improperly handled by them in certain cases.

(d) Prohibited Interests under Specific Statutes

Certain other statutes that govern the operation and activities of those working in the service of the federal government contain rules about conflict of interest. The National Energy Board Act, for example, states that board members may not hold interests in energy companies and similar investments which could cause a conflict with their official duties.

(e) Conflict of Interest Provisions Affecting Parliamentarians

Members of Parliament are subject to conflict of interest rules which are found in the House of Commons Act, the Senate and House of Commons Act, the Standing Orders of the House of Commons, the Criminal Code, the Canada Elections Act, the Rules of the Senate, and the laws and usages of the Parliament of the United Kingdom as preserved by section 18 of the British North America Act.

Members must not accept bribes or prohibited fees, nor can they hold offices incompatible with their membership in the House (such as an office or employment elsewhere in the government to which a profit is attached, positions such as a provincial legislator, sheriff, clerk of the peace, registrar of deeds or county Crown Attorney).

With a few exceptions, members of the House and senators may not be a party to a government contract which will result in their receiving public funds. Certain financial interests held by members and senators are considered to be incompatible with

holding office and, as such, they are not permitted to vote on issues in which they have a pecuniary interest.

(f) Provisions of the Public Service Employment Act

Section 32 of the Public Service Employment Act sets the limits of political partisanship activities by public servants. It states that no deputy head and, except as authorized under this section, no employee may work for, on behalf of or against a candidate for election to the House of Commons, a provincial legislature or a member of the territorial councils, or work for, on behalf of or against a political party. It is permitted to attend a political meeting and also to contribute money for the funds of a candidate or political party.

(g) Provisions of the Public Service Staff Relations Act

The Public Service Staff Relations Act contains certain prohibitions regarding the participation in and the interference with the activities of employee organizations and other actions which may not be taken by individuals employed in a managerial or confidential capacity. In general, no one may refuse to employ or discriminate against an employee because of his or her membership in an employee organization. Also prohibited is any attempt to dissuade an employee from being a member of the employee organization. Employee organizations may not use the employer's premises during working hours to conduct business related to membership.

(h) Cabinet Ministers Guidelines

The conflict of interest guidelines for ministers of the Crown apply to ministers and, at their discretion, to members of their exempt staff. As a minimum, they normally apply to executive assistants and senior policy advisors. In addition, there are also post-employment guidelines for ministers.

The underlying principles of the Ministers' Guidelines are that the onus for preventing conflicts rests with the individual; ministers must arrange their private affairs so as to preserve the public interest; and ministers must not take advantage or appear to take advantage of their positions or of information that is gained by way of their positions that is not generally available to the public.

On appointment, or soon after, Ministers must: cease to practice a profession or to operate any business or commercial activity and to manage controlled or non-exempt assets; not serve as paid consultants; not accept or retain directorships or offices in commercial corporations, although there is leeway in the case of philanthropic organizations; and not participate actively as members in unions or professional associations.

Ministers are warned by these guidelines against giving preferential treatment to friends and relatives and are cautioned against placing themselves under obligation to others whom might profit from favours. They are expected to disclose in the Public Registry all gifts or other benefits they receive which are valued at over $200 excluding personal and official gifts or hospitality from other governments.

The personal holdings of ministers are divided into exempt assets, discloseable assets and controlled or non-exempt assets.

"Exempt assets" include: residences and recreational property used or intended for use by ministers or their families; household goods and personal effects; automobiles; boats and other means of transport for personal use; works of art; cash and deposits (but not cash or deposits in foreign currency held for investment or speculative purposes); Canada and provincial savings bonds; registered retirement savings plans that are not self-administered; self-administered registered retirement savings plans composed exclusively of exempt assets; registered home ownership savings plans; investments in open-ended mutual funds; guaranteed investment certificates and similar financial instruments; income averaging and other annuities; accrued pension rights; life insurance policies; money owed by a previous employer, client or partnership; family loans and personal loans under $5,000 to any individual.

For these, there is no requirement for public disclosure. In general, there are no restrictions on dealing with property which is for personal use.

"Discloseable assets" are those which are unlikely to give rise to conflicts and which may be disclosed in the Public Registry. They include ownership interests in family businesses or other businesses of a local character whose shares are not traded publicly and which do not contract with the government or control shares in public companies; farms; real property other than that which is exempt; and the beneficial ownership of the assets of trusts other than blind trusts.

All assets which are not either exempt or discloseable are therefore considered to be controlled or non-exempt assets. Discloseable assets that are not disclosed are to be treated like controlled assets. These must either be sold or placed at arm's length in a blind trust. "Controlled assets" include: publicly traded securities of corporations and governments; interests in partnerships, proprietorships, joint ventures, private companies and family businesses which are not discloseable assets; stock options (except those of private companies referred to above under

"discloseable assets"); self-administered registered retirement savings plans, except those composed exclusively of exempt assets; real property which is not an exempt or discloseable asset; commodities, including metals, and foreign currency for speculative or investment purposes; interests in profit sharing plans; and loans that exceed $5,000 to individuals not connected with the minister concerned by blood relationship, marriage or adoption.

The procedures for establishing a trust, appointing trustees and maintaining the trust are very specific in terms of what may and may not be done.

A minister who has established a holding company for estate planning purposes may establish a retention trust for dealing with this asset.

If a minister is the executor or trustee of an estate, he or she must disclose this fact to the Prime Minister through the ADRG and take steps to ensure that conflicts do not arise out of such involvement.

Although the spouses and dependent children of ministers are not required to abide by the guidelines, ministers are cautioned that they should be careful to ensure that conflicts do not arise out of the interests of family members.

The guidelines contain detailed procedures on compliance in terms of administrative detail. They also contain a reminder that ministers are subject to the Senate and House of Commons Act.

The Post-Employment Guidelines for Ministers indicate that ministers should not be influenced in their official duties by prospects of future employment. When such offers are received, ministers are expected to advise the Prime Minister before accepting any position, especially where the position could cause a conflict of interest. Further, when seeking future employment, ministers must ensure that there is no real or apparent conflict of interest. After they have left office, ministers are required to conduct themselves in such a way as to avoid grounds for allegations of improper influence, privileged access and preferential treatment.

After a minister has left office, he or she must not, within a period of two years: accept a position to a board of directors of a company which was in a special relationship with the department or agency for which the minister was responsible; switch sides to work for a company in connection with an activity which involves the government and in which he or she had a personal and substantial involvement on behalf of the government; or lobby the department or agency for which he or she was responsible.

Within one year of leaving office, a former minister must not: accept employment with a company with which he or she had significant direct official dealings; switch sides in connection with any activity which came under his or her jurisdiction; or give counsel for commercial purposes concerning any of the policies or programs for which he or she was responsible on an ongoing basis or with which he or she had a direct and substantial relationship.

(i) Instructions to Parliamentary Secretaries

Parliamentary secretaries do not have a conflict of interest régime as such. At the time of their appointment, they are sent a letter from the Prime Minister advising them of the conduct expected of them and those activities which should be avoided. They are asked to examine, on a continuous basis, the responsibilities they have been assigned as parliamentary secretaries to ensure that there is no possibility of real or apparent conflict. They are encouraged to discuss any matters with their minister where they require guidance.

Parliamentary secretaries are subject to a post-employment régime which parallels that for ministers except that the cooling-off periods are one year and six months respectively. Finally, they are reminded of their obligation to observe the Senate and House of Commons Act.

(j) Policy Governing Ministers' Exempt Staff

Ministers, at their discretion, may designate certain staff to be subject to the Ministers' Guidelines. At least executive assistants and senior policy analysts are to be so designated but in some cases ministers designate their entire staff. Those who are not specifically designated are automatically subject to the Public Servants' Guidelines. With respect to post-employment guidelines, ministers' exempt staff at the equivalent level of deputy head are subject to Ministers' Post-Employment Guidelines while those at or above the EX-1 equivalent level are subject to the same post-employment guidelines as parliamentary secretaries and public servants at the same level.

(k) Governor-in-Council Guidelines

The conflict of interest guidelines for Governor-in-Council appointees apply to those who hold positions at or above the Executive Officer one or equivalent level. The guidelines specifically have not been applied to part-time Governor-in-Council appointees, nor to members of the judiciary or quasi-judicial agencies except by special request.

The conflict of interest guidelines indicate that Governor-in-Council appointees must adhere to the guidelines but must also adhere to the Public Servants' Guidelines as a minimum.

During their tenure, Governor-in-Council appointees are prohibited from engaging in a profession or the management or operation of a business and from retaining or accepting directorships in companies. Some latitude is given for involvement with philanthropic organizations.

As with the Ministers' Guidelines, dealing with property can be handled under three different categories: exempt, discloseable and non-exempt or controlled. Examples of exempt property are: the residence or residences actually used by an official, including a summer or winter residence or farm; personal household goods or effects or other property used for ordinary living and enjoyment; automobiles, boats, snowmobiles and other modes of transport for personal or family use including privately owned aircraft; cash, including cash held in chequing or savings accounts, Canada Savings Bonds, securities of any level of government in Canada or agencies of these governments; registered retirement savings plans, investments made in mutual funds for the purpose of providing retirement income; and debts.

Discloseable assets, which may be the subject of a public declaration, include leasehold interests; real property; private companies, the stocks or shares of which are not traded on public exchanges; and other assets which cannot be easily affected in value as a result of government decisions.

All assets which are neither exempt nor discloseable are non-exempt or controlled and must therefore be divested by means of a frozen trust, a blind trust, or outright sale. The guidelines contain details for the establishing and maintenance of trusts and the selection of trustees.

Since spouses and dependent children are not specifically covered by the guidelines, Governor-in-Council appointees are advised that they must ensure that the interests of family members do not pose conflict of interest problems. They are further advised that any breach of the guidelines could subject them to sanctions including the revocation of their appointment.

Governor-in-Council appointees are subject to the Post-Employment Guidelines for Holders of Public Office as described below in section (n) of this chapter.

(l) Policy Governing Part-Time Governor-in-Council Appointees

When conflict of interest guidelines were announced in the Commons in 1973, it was indicated that they were intended to apply to, among others, Governor-in-Council appointees working full time. Guidelines have never been prescribed, however, for Governor-in-Council appointees working part time.

Part-time Governor-in-Council appointees are subject nevertheless to certain other specific requirements. These include: the enabling legislation of the organization to which they are appointed or the regulations and directives of that organization; the laws of general application, such as the Canada Business Corporations Act, which may apply to their organization; and the Criminal Code. They may impose other requirements on themselves, including adherence to the Governor-in-Council Guidelines if they so desire.

In the government's efforts to help public office holders ensure that their official duties and responsibilities are carried out in accordance with acceptable standards of conduct, policy generally is to encourage organizations to which part-time Governor-in-Council appointments are made, to develop their own rules or practices adapted to their particular circumstances and based on the intent of existing guidelines.

Nevertheless, special attention is given to part-time Governor-in-Council appointees who occupy positions which carry duties and responsibilities and call for the exercise of authority and influence akin to those exercised by full-time Governor-in-Council appointees. Usually, in these cases, the individual is asked to make a full disclosure of interests and involvements to the appropriate official to whom the individual reports; the legislation (pursuant to which the part-time appointee has been named) may provide further guidance as to how appointees may organize their personal affairs so as to avoid conflicts; and the protection of the Governor-in-Council Guidelines can be sought.

(m) Instructions to Lieutenant-Governors

Lieutenant-Governors are Governor-in-Council appointees and therefore technically should be subject to the Governor-in-Counil Guidelines. However, the policy here is somewhat different. Since 1975, prospective Lieutenant-Governors have been asked, at the time of their appointment, to avoid holding certain offices and engaging in some activities.

When a Lieutenant-Governor is appointed, the Assistant Deputy Registrar General communicates with the designated appointee to inform him or her of the three main conflict of

interest principles to which they are expected to adhere: Lieutenant-Governors may not retain or accept directorships in profit-oriented companies, engage in the practice of a profession, or engage in the active management of a business. They are also asked to be sensitive to prevent any conflict from arising.

(n) Public Servants' Guidelines

The Public Servants' Conflict of Interest Guidelines apply to all public servants, to full-time Governor-in-Council appointees (as explained above in section (k) of this chapter), and to those members of a minister's exempt staff who have not been designated as subject to the Ministers' Guidelines.

The Public Servants' Guidelines establish seven rules which can be summarized as follows: (1) individuals must act in a manner that will bear the closest public scrutiny; they must not place themselves in a position where they are under obligation to anyone who may benefit from or seek preferential treatment and, they should not have any pecuniary interest which could conflict with the discharge of their official duties; (2) conflicts should not exist in fact or in appearance between a public servant's official duties and his or her private interests. Arrangements to avoid conflicts are to be made on appointment; (3) public servants should not benefit or appear to benefit from the use of official information which is not available to the general public; (4) they must not place themselves in positions where they could gain any direct or indirect benefit from government contracts; (5) all business and financial interests which are or could be a source of conflict must be disclosed to the individual's superior; (6) outside employment may not be held if it places on the public servant demands inconsistent with his or her official duties; and (7) preferential treatment may not be accorded to relatives, friends or organizations with which they or their relatives or friends are associated.

There are, in addition, Post-Employment Guidelines for Public Servants. These guidelines consist of a policy statement and five appendices. The policy states that the purpose of the guidelines is to give a degree of certainty to the activities of employees during and after their employment with the government.

Appendix I, "Principles Regarding the Activities of Holders of Public Office," requires that current and former holders of public office ensure by their behaviour that no one is given reason to believe that they are giving preferential treatment to anyone; ensure by their behaviour that there is no reason to believe that they have privileged access to government personnel or services; and take care not to benefit or to appear to benefit from the use of confidential information.

Appendix II, "Guidelines for Holders of Public Office During their Employment with the Government," states that public office holders must disclose to their superiors any offers of employment that could conflict with their official duties; offers under serious consideration from private sector organizations with which he or she has had official dealings; and offers that have actually been accepted. They are directed to take care to ensure that in seeking or preparing for outside employment, they do not create actual or potential conflicts and do not engage in commercial negotiations with other government employees without the permission of their superiors. Once they leave the employ of the government, former office holders must ensure that there is no appearance of improper influence, privileged access or preferential treatment.

Appendix III, "Guidelines Applying to Employment and Commercial Activities of Former Holders of Public Office," specifies those activities in which a former office holder may not engage for a certain time after leaving the government. A former office holder must not within the relevant time period accept an appointment to a board of directors of a company which was in a special relationship with the department or agency where he or she was previously employed; switch sides to act for a company in relation to any matter to which the government is a party and in which he or she had personal and substantial involvement; or lobby any department or agency where he or she was employed or with which he or she had a direct and substantial relationship. The time frame is two years for ministers, deputy ministers, heads of agencies and ministers' exempt staff at the deputy head level. It is one year for parliamentary secretaries, full-time Governor-in-Council appointees, ministers' exempt staff and public servants at or above the Executive one level.

Furthermore, former public office holders must not within the same relevant time period which is, in this case, one year for the first group and six months for parliamentary secretaries, full-time Governor-in-Council appointees, and ministers' exempt staff and public servants at or above the Executive one level--do any of the following: accept employment with a company with which they had significant direct official dealings; switch sides in connection with any matter which was under their authority; or give counsel for commercial purposes on the programs or policies of the department or agency with which they were employed or had a significant relationship.

Appendix IV, "Administrative Arrangements," outlines the purpose and composition of the committees formed to deal with the application of the post-employment guidelines in specific instances. These committees may recommend exemptions from the guidelines. There are three such advisory committees—one for ministers and parliamentary secretaries; one for

Governor-in-Council appointees and ministers' exempt staff; and one for public servants.

Appendix V, "Rules of Practice for Hiring of Former Public Servants by the Government," states two basic rules. First, persons are not eligible for certain government appointments if they lobby for clients or give counsel for commercial purposes about government activities. Second, the approval of the minister involved and the Treasury Board, as may be appropriate, must be sought for contracts of $2,000 or more to former Governor-in-Council appointees and public servants who are in receipt of a government pension.

(o) Supplemental Guidelines for Departments, Boards, Commissions and Agencies

In part (d) of this chapter, reference was made to prohibited interests and conflict of interest provisions contained in specific statutes. These are laws. Serving a similar purpose, but not always with the force of law, are the supplemental guidelines for departments, boards, commissions and agencies.

In 1973, when the general Public Servants' Guidelines were promulgated, Treasury Board invited departments and agencies of the federal government to devise additional or supplementary guidelines where necessary due to the special or particular requirements of the department or agency. As a result, 80 such supplemental codes have been developed. Copies of these codes have been placed with the Library of Parliament and the Assistant Deputy Registrar General and some of their provisions are discussed elsewhere in this report.

(p) Contractual Terms and Conditions and Provisions of Collective Agreements

When individuals are appointed to the public service, a contract of employment is in most cases entered into. The form and nature of these contracts varies, but typically provisions are included which pertain (to a greater or lesser degree) to conflict of interest matters. In a letter contract, the terms and conditions are accepted by the offeree simply by signing and dating the duplicate copy of the letter. A copy of the guidelines is not necessarily provided nor is it insisted that the new employee signify that he or she has read and understood the terms and conditions of the guidelines and is prepared to comply with them.

As casual as this approach may appear, a number of departments do not make mention of the guidelines at all at the stage of recruiting new employees or signing employment contracts with them. Nevertheless, in a number of instances legally binding

contracts exist which incorporate conflict of interest guidelines.

(q) Oaths or Affirmations of Office

On appointment to office, ministers are required to take, first, an oath or affirmation of allegiance, in which they swear or affirm to be faithful and bear true allegiance to the Queen; second, the oath or affirmation of the Members of the Privy Council, by which they swear or affirm to keep the confidences of the Privy Council, to speak their minds openly within the Privy Council, and to be diligent, vigilant and circumspect in all dealings with Her Majesty's affairs; and third, an oath or affirmation of office, by which they swear or affirm to fulfil their duties to the best of their skill and power.

On appointment from outside the Public Service, public servants and deputy heads are required pursuant to section 23 of the Public Service Employment Act, to take an oath or affirmation of allegiance and a separate oath or affirmation of office and secrecy. These oaths or affirmations are not the same as those required of members of the Privy Council.

OATH OR AFFIRMATION OF ALLEGIANCE

I,_____
do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to law. (So Help Me God).

OATH OR AFFIRMATION OF OFFICE AND SECRECY

I,_____
solemnly and sincerely swear (or affirm) that I will faithfully and honestly fulfill the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment. (So Help Me God).

The oath or affirmation of office and secrecy was enacted by Parliament as Schedule III of the Public Service Employment Act.

In addition to this general requirement for deputy heads, many Governor-in-Council appointees, for example, the Commissioners of the Public Service Commission, are required to subscribe to oaths or affirmations specific to their office.

These oaths or affirmations usually are contained in departmental acts or enabling legislation.

Governor-in-Council appointees do not, as a matter of course, take an oath or affirmation on appointment. If Governor-in-Council appointees do take an oath, it is administered by or at the department or agency to which they are appointed.

Parliamentary secretaries do not take a special oath or affirmation for that particular office. They are still bound, however, by the Oath of Allegiance (or the affirmation in lieu of the oath) which they took upon election as members of the House of Commons.

Ministers' exempt staff are not specifically required to take any oath or affirmation on appointment. Although a minister may request his or her staff to take an oath or affirmation of office or secrecy, there is no routine procedure in this regard.

There is some question as to whether the oaths taken or affirmations given are actually binding in law or only in morals, a matter which is examined in Chapter 11, "Particular Issues and Considerations."

CHAPTER 9

CRITIQUE OF THE PRESENT FEDERAL CONFLICT OF INTEREST LAWS AND GUIDELINES

(a) Introduction

In response to an invitation to comment on the present guidelines, many criticisms were received including a number we consider serious and valid. It is significant, however, that no one who made representations disputed the need for written rules and most said that the present guidelines, with all their faults, are based on sound and reasonable principles.

(b) Principal Criticisms and Comments

The major criticisms follow together with our comments.

1. The scope of the guidelines relating to Governor-in-Council appointees is uncertain and too sweeping

The Post-Employment Guidelines provide the following definition:

> "Governor-in-Council appointees" denotes persons appointed by or with the approval of the Governor-in-Council or a minister, or in receipt of remuneration fixed by the Governor-in-Council who are in full-time positions with government departments, Crown corporations and autonomous agencies, but not those persons who are members of bodies with primarily judicial or quasi-judicial functions.

All these appointees - and, as noted below, we are uncertain as to how many there are, who they are and what they do - are treated alike in the present guidelines: For example, the rules about divestment are the same for all appointees. This may be a simple method for dealing with a complex problem but is neither fair nor reasonable. That is why we recommend a

functional approach whereby the investment restrictions are related to the nature of the duties and responsibilities of the appointee.

The consequence of the across-the-board approach of the guidelines is illustrated in the appointment of ambassadors, high commissioners and consuls general (heads of post) by the Governor-in-Council and the requirement, as a result, that they divest themselves of investments in the same manner as deputy ministers. The large majority of appointments of heads of post are made from the ranks of the career foreign service, and particularly from the group of officers in the Department of External Affairs (public servants) who are rotational as a condition of employment and are redeployed according to foreign service assignment policy and procedures. For them, appointment as a head of post is part of a career structure that includes assignments at headquarters and abroad. Appointments are also made of other departmental employees and of public servants from other domestic departments and agencies, particularly those having international programs; on completion of their assignments as heads of post, they normally return to their previous or similar positions.

There is a basic inequity in applying Governor-in-Council Guidelines to public servants on assignment as heads of post, when they are not applied to public servants holding positions of equal or greater responsibility in Canada. The possibility of actual or potential conflict of interest is at least as great for domestic employees of equivalent rank and responsibility who are involved in policy decisions that could have immediate and direct commercial consequences (in the fields of regional grants, energy development, or mineral production, for example) or who have administrative functions such as procurement for the government, hiring of employees, allocation of grants and the awarding of contracts; these employees are not subject to the guidelines for Governor-in-Council appointees to which heads of post must adhere.

The process of complying with the guidelines is sometimes difficult because the heads of post, unlike other Governor-in-Council appointees, are assuming positions outside of Canada. Arrangements occasionally have to be completed while individuals concerned are in the final stages of moving to their post, or while they are actually on post. Consequently, they become involved in extensive correspondence with the Assistant Deputy Registrar General's Office, trust companies, lawyers, investment counsellors, stockbrokers and other intermediaries and, at times with emotional ramifications, with interested family members. At the end of a posting abroad, if they wish to hold their assets directly, they must then go through the reverse process of disengagement from such arrangements which are not necessarily required for a headquarters assignment.

An element of frustration exists within this group because of the relative modesty of the assets involved, often including a residence in Canada which inevitably has to be rented during the absence of the owner, or stocks inherited from within the family, which have more sentimental than commercial value. Since the distance of the post from Canada, generally, reduces rather than increases the likelihood of a head of post having access to inside information, career heads of post also find it anomalous and discriminatory to be subject to stricter guidelines and constraints than officials to whom they report in departmental headquarters.

The responsibilities and functions of heads of post differ greatly from deputy heads of departments and agencies so there is no reason why they should be subject to the same strict guidelines. We believe it would be more appropriate that they be treated as other public servants under the jurisdiction of the Under-Secretary of State for External Affairs.

Our attention was drawn to the case of an Executive Director of the Standards Council of Canada who, after appointment and much to his surprise and dismay, was required to follow the full divestment rules although there was little, if any, discernible conflict between his public duties and his private interests. We believe, on the basis of the submissions made to us, that there are others like him among Governor-in-Council appointees.

The present structure of guidelines produces inconsistencies and unfairness, simply because, on the one hand, Governor-in-Council appointees are subject to the most rigorous uniform investment rules, whereas other public servants are subject to a régime that permits the exercise of judgement on the part of the head of the department or agency. Our Task Force learned, for example, of public servants at the level of assistant deputy minister, who were not required to divest but who supervised the activities of heads of agencies who had been appointed by Governor-in-Council and had therefore been required to follow the divestment rules. Technically, the heads of agencies report to the minister but, as the members of the Task Force know, for administrative reasons, the minister sometimes has to delegate his responsibilities down the line.

One of the problems encountered was uncertainty as to who is subject to the Governor-in-Council guidelines, notwithstanding the definition cited above. Deputy ministers are covered and so are full-time heads of Crown corporations and agencies except persons who are members of bodies with primarily judicial or quasi-judical functions. However, there are some differences of opinion within the government itself as to how to define bodies with primarily judicial or quasi-judicial

functions. Apart from that, we did not have a complete list of full-time heads of Crown corporations and agencies appointed by the Governor-in-Council or by ministers, which, we were informed, number slightly more than 100. This lack of certainty, however, has not affected the nature of the recommendations we make. Indeed, the numbers involved in Governor-in-Council and ministerial appointments emphasize the importance of adapting the procedures to minimize conflict of interest on a functional basis to the nature of the duties and responsibilities of the various appointees.

2. Inconsistency in the content and administration of departmental and agency guidelines

While guidelines for Governor-in-Council appointees were criticized for being too sweeping, the departmental guidelines were criticized for being inconsistent both in content and administration. Discretion as to what measures should be taken by their employees to minimize conflict of interest is vested in the deputy minister or head of agency. This is desirable in order to fit with the diversity of the duties and responsibilities of the various departments. For example, the divestment rules applicable to an assistant deputy minister in the Department of Finance could be different from those applicable to an assistant deputy minister in the Department of Agriculture. There is evidence, however, that so much depends upon the individual attitudes of deputy ministers and heads of agencies towards conflict of interest problems that there is a marked inconsistency in application and some inconsistency in content of departmental or agency guidelines. All officials are expected to behave in a manner so scrupulous as to bear the closest scrutiny. Yet some are scrutinized and some are not.

The creation of an Office of Public Sector Ethics, one of whose tasks would be to advise deputy ministers and heads of agencies in the preparation and administration of departmental or agency codes of ethics, would help to promote consistency and fairness.

3. Application of the guidelines for Governor-in-Council appointees to executives of Crown corporations affects their competitiveness

Two general points were made. The first was that whatever restrictions are applied should relate on a functional basis to the activities of the Crown corporation to which the person is appointed and should not lump them all together as to divestment of securities they hold. What is appropriate by way of divestment to minimize conflicts of interest for the Chairman of the Canada Mortgage and Housing Corporation is not the same as for the President of Air Canada. The second point was that by

preventing such executives from joining the boards of directors of other corporations and by implication imposing similar restrictions on other officers, the guidelines put Crown corporations at a disadvantage in the market place with their private competitors who are not subject to such restrictions. These issues are discussed and recommendations are made in Chapter 17.

4. Absence of discretionary power in administration of the guidelines

Perhaps one of the most serious problems with the current conflict of interest and post-employment structure in general is the absence of built-in flexibility in applying the guidelines in special situations. We mentioned earlier the case of the employee who was forced to place in trust 10 shares of Bell Canada given to her by her grandmother so that she would be in absolute compliance with the guidelines.

It appears that, because of this lack of flexibility, including the lack of some kind of de minimis rule, those who administer them are forced to apply them to the letter rather than in the spirit of the guidelines as intended, causing, in many cases, considerable extra administrative burden. One former official who appeared before the Task Force submitted his personal disclosure file which had been maintained by the Assistant Deputy Registrar General during the time he was a Governor-in-Council appointee. He had been given his closed file on his retirement and was shocked to see the amount of correspondence which transpired to deal with relatively minor holdings. He observed, however, that perhaps that office did not have any latitude to judge the degree to which individuals were or were not conforming to the intent of the guidelines as against the technical detail of the guidelines.

Advisory committees on post-employment have been established to interpret the guidelines and to advise on cases that come before them. The committee system was designed to assure the public that the advisability of a public office holder engaging in certain activities had been considered in detail. It was originally considered that these roles for the committees would allow them to interpret the guidelines more liberally than the office holder might feel able to do on his or her own initiative. Also, it was considered that such a system would provide greater protection for a public office holder, who had sought and followed the committee's advice, against any future allegations of improper behaviour. The committees are authorized to recommend exemptions from the guidelines in any case where fairness to individuals or public interest requires. The record indicates that these committees have rarely met, and that only a few exemptions have ever been requested.

There would be an understandable reluctance on the part of the individual to seek the advice of a committee regarding prospective future employment - especially if it were feared that the committee would advise against it. In certain cases, it would be in the greater public interest to encourage the use in the private sector of knowledge and experience gained while in the public sector, particularly in its relationship to government. The appearance of conflict in such a situation, however, would discourage many individuals even if there were no real conflict.

The post-employment cooling-off periods, when interpreted literally, are very restrictive in terms of permissible post-employment activity. Individuals whose line of work is highly specialized could experience difficulty in finding employment after their government service. There are often cases where the waiving or reduction of a cooling-off period would be appropriate. Such a mechanism does not exist at this time unless the appropriate advisory committee makes a recommendation for an exemption to the designated individual. We believe an Ethics Counsellor of the type proposed could exercise some, although limited, discretion in such cases.

5. Shortcomings of Trust Arrangements

We expected to hear objections to the requirements imposed on ministers and Governor-in-Council appointees by the guidelines to divest themselves of certain investments by putting them into trusts. We did hear these objections and it is important to record in this report the depth of the dissatisfaction expressed by some of those subject to the current guidelines.

Some objected in principle on the grounds that the requirement to divest amounts to an expression of lack of confidence in the integrity of office holders. Some objected because, in their opinion, trustees of blind trusts mismanaged their portfolios, resulting in serious financial losses for them and their families, which they considered grossly unfair.

Although we can see no feasible alternative to trusts as a means of temporary divestment of assets that could involve conflicts between public duties and private interests, (except to a limited extent, disclosure) the general public should be aware that trusts are at best an imperfect instrument, the administration of which can and does result in unfair sacrifices for those who decide to enter public service, elected or appointed. It is all the more important, therefore, to assure that the requirements to divest are really necessary to minimize conflicts of interest and that there is as much flexibility in administration as is consistent with the spirit of the rules.

We heard complaints about the costs of establishing blind trusts. In certain cases, the annual trustee fee and expenses for managing and administering a trust were higher than the annual income of the trust. Although some relief has recently been given by the government in the form of financial assistance, the basic problem remains for those who have small holdings of shares, which is another reason for our support of a de minimis rule and for the re-establishment of frozen trusts as an option for ministers.

6. Relation between guidelines on conflict of interest and the Criminal Code

We received submissions from one public service union expressing concern about the nature of certain Criminal Code provisions as they pertain to public servants.

There may indeed be problems as to how the provisions of the Criminal Code mesh with the guidelines, particularly some of the detailed provisions in some of the supplemental codes and in some of the legislation. We do not recommend any changes in the Criminal Code but rather favour clarification of the principles and rules governing non-criminal conflict of interest situations, so that the relationship between the criminal and the non-criminal provisions can be more clearly seen, applied and understood.

7. Disclosure

Current guidelines for Governor-in-Council appointees offer the option of public declaration of certain kinds of holdings on a very limited and restricted basis in stating that, "the use of this option is not to extend to stock or securities traded on public exchanges -- and must not extend to property the management of which could conceivably put an official in a conflict of interest situation." Current guidelines for ministers give them a similar restricted option although the definitions are somewhat different.

We received representations that public disclosure should be available on a wider basis as an alternative to divestment for both ministers and Governor-in-Council appointees. In Chapter 6, this possibility is discussed.

8. Post-Employment Guidelines

Nearly all of those who made representations to us personally or in writing were critical of some aspects of the rules applying to former office holders, including:

(i) Enforceability

The guidelines are not law. While current office holders can be disciplined administratively for breaches of the guidelines, former office holders cannot be. The result is that while public spirited and conscientious former office holders feel obliged to follow the guidelines, those who are less public spirited and less conscientious or simply disagree with the guidelines feel no obligation to do so.

(ii) Ambiguity

Even those who try to observe the guidelines are uncertain as to what they mean. For example, what does "lobbying" mean?

(iii) Length of cooling-off period

There was general criticism that the "cooling-off" periods in the post-employment guidelines for ministers, parliamentary secretaries and public servants were too long. The two year limitation, applying to acceptance of directorships and "lobbying" by former ministers, deputy ministers, heads of agencies and exempt staff was criticized in particular as excessive, having in mind the short "shelf-life" in modern life of confidential information obtained while in office. The cooling-off period for parliamentary secretaries and public servants in this regard is one year.

(iv) Current Post-Employment Guidelines are counter-productive

It was represented to us that the public interest benefits from the movement of people from business to government and vice versa and that some of the restrictions in the current post-employment guidelines unnecessarily hamper that movement.

(v) Former ministers and former public servants should not be treated alike

Former ministers face problems different from former public servants when they seek employment in the commercial world. Seldom do ministers with business backgrounds resign voluntarily in order to take private employment. A high proportion of them, in one way or another, are forced out of office and have to look for a job, a fact which is not recognized in the current post-employment guidelines, which apply the same rules to both former ministers and former public servants.

(vi) Post-employment problems exist among public servants below the rank of deputy minister that are not being dealt with adequately under the current guidelines

The view was expressed to us that in some departments it was not uncommon for middle rank public servants to retire from the public service to take employment in companies with which they had dealt in an official capacity. It was not in our mandate to investigate allegations of this kind and we did not do so. They serve to underline the point that whatever rules prevail should apply throughout the system on a consistent basis at all levels of responsibility.

(vii) Hiring of former public servants by the government

Appendix V of one of the current guidelines (reproduced in Schedule D) contains in paragraph 2 an administrative ruling about hiring former public servants that has nothing to do with conflict of interest.

CHAPTER 10

APPROACHES TO STANDARDS OF ETHICAL CONDUCT ELSEWHERE

(a) Introduction

Your terms of reference to us, Prime Minister, asked that we review available information with respect to experience in the area of conduct in other political jurisdictions, both domestic and international, and in the private sector.

We have reviewed in some detail the current provisions governing conflict of interest matters at the provincial, territorial and municipal levels in Canada, and have looked at how Canadian professional organizations and businesses approach the topic of ethical conduct by their members and employees. We have also studied the United States experience, both at the federal level and in a number of states. Looking abroad, we have considered the situation in other Commonwealth countries, including the United Kingdom, Australia and New Zealand.

The approaches taken to conflict of interest and standard of conduct matters by other governments vary considerably one from another. This chapter provides a resumé of some of their provisions and approaches in order to present an understanding of the methods employed elsewhere. Specific concepts or solutions in other jurisdictions are considered at several points in this report.

(b) Provincial Experience

The provisions of the Criminal Code, discussed earlier in the context of federal conflict of interest laws, apply in all provinces and territories, and thus represent the same starting point as at the federal level, by providing a bedrock on which other rules with respect to ethical conduct were added.

Several general observations can be made. For the most part, the disclosure required by ministers and members at the provincial level is a public form of disclosure (made through the Clerk of the Legislative Assembly), whereas for public employees, disclosure is on a confidential basis. Deputy ministers are often covered by the same legislation which governs ministers. In some

provinces, disclosure by public office holders of assets (particularly land) is restricted to assets in the province while other provinces make no such distinction. The situation vis-à-vis Crown corporations varies from province to province, with some applying the same rules to Crown corporations as to the public service, others not. The experience of each is considered in turn.

British Columbia

The Constitution Act, the Financial Disclosure Act (1974) and the Public Service Act are the three principal governing statutes. A number of provisions pertain to members of the British Columbia Legislative Assembly, as well as to Cabinet ministers. As in the treatment of federal Cabinet members and parliamentary secretaries, we take note of the provisions which apply to private members of the legislature, since these provide a basic set of rules with which those elevated to the Cabinet must already comply.

Under the Constitution Act, no member of the Legislative Assembly is entitled to accept from the Crown in right of the province money for the supply to the province of any goods, service or work, or money from an office or employment which is appointed by the Crown in right of the province. These rules, contained in sections 26 and 33, have exceptions for incidental matters, mostly in the nature of payments through a program of general application for which a member, entitled by virtue of being part of a larger group, qualifies.

Sections 26 and 33 of the Constitution Act also stipulate (again with specific exceptions) that no member of the Legislative Assembly (MLA) may be a director or senior officer, as defined in the Company Act, of a corporation, or a person to whom, as a shareholder, section 5(1) of the Financial Disclosure Act applies. The penalty for contravening these provisions of the Constitution Act is disqualification as an MLA and the Act states that an MLA will be disqualified if, among other reasons, he becomes bankrupt, an insolvent debtor or public defaulter, or is convicted of "any infamous crime".

Under the Financial Disclosure Act of 1974 a person who accepts a nomination for election to office as a provincial or municipal official (which includes a minister or member of the Legislative Assembly) must make written disclosure. Such an official, as well as provincial public employees and municipal employees, must make a written disclosure twice a year. A person ceasing to hold office must file a written disclosure within 15 days following departure from office. The "disclosure" pertains to: (1) names of corporations in which the official or public

employee holds one or more shares; (2) the name of each business in British Columbia where the official or employee receives remuneration for services performed as employee, owner, trustee, and so forth; (3) the names of creditors; and (4) land situated in the province in which the official or public employee has an interest. If a provincial official or public employee holds more than 30 per cent of the votes for election of directors to a corporation (including joint holdings with a spouse, child, brother, sister, mother or father), section 5 of the Act requires that considerable additional information be disclosed.

Disclosure by provincial and municipal elected officials is public disclosure, made through a disclosure clerk. Failure to make written disclosure renders the violator liable to a fine of not more than $10,000. The Supreme Court of British Columbia may, if it finds wilful contravention of the Financial Disclosure Act, order the contravenor to pay to the employer (the Government of British Columbia or the local government) the amount of the financial gain. With respect to public servants in British Columbia, it should be noted that the Financial Disclosure Act, discussed above, also applies to designated public employees although we understand that none has yet been designated. The Public Service Act itself has several sections pertaining to conflict of interest matters under the statute. For example, an employee is prohibited from engaging in remunerative employment with another employer, or from carrying on a business, except with the Public Service Commission's approval. A deputy minister may act as a director or officer of a Crown corporation if appointed to the position by the Lieutenant-Governor in Council, but is prohibited from accepting remuneration from such a position.

In cases where the Financial Disclosure Act would cover municipal employees, public employees (including those on boards, agencies or commissions under the Public Service Act for persons appointed by the Lieutenant-Governor in Council) full but not public disclosure has to be made, but not public disclosure. However, the Supreme Court of British Columbia may make disclosed information public if proceedings are engaged in against a public or municipal employee for contravention of the Financial Disclosure Act. Various ministries are drawing up conflict of interest guidelines, which must be approved by the Public Service Commission.

Alberta

The Province of Alberta has statutes and a Code of Conduct to deal with conflict of interest matters. The Legislative Assembly Act (1983) deals with conflict of interest most comprehensively, providing for disqualification of a member if he or she, or a person directly associated with him or her,

becomes a party to certain types of contracts with the government, including, subject to limited exceptions, the sale of land to the government. The acceptance of public money by the MLA or a person associated with him or her also entails disqualification.

Members of the Legislative Assembly may seek advice and direction, ex parte, from a court, concerning contracts. Each member is required to file a disclosure statement, indicating the name and address of each person with whom he or she is directly associated, and with whom he or she has been directly associated but with whom he or she has ceased to associate. The Provincial Treasurer of Alberta must file an annual report with the Assembly, making it a public document, showing the names of members of the Legislative Assembly, the persons directly associated with them, and information on payments to the ministers and those directly associated with them.

Under the Act, an MLA may place his or her holdings in a blind trust. Members may not own, directly or indirectly, shares in any public company whose business might be materially affected by the Government of Alberta (a rule derived from the Premier's 1973 policy statement, discussed below).

Cabinet ministers in Alberta must file (and update) a statement with the Clerk of the Assembly (which again makes it a public document), giving a legal description of all land in Alberta, including mineral rights in which they or their families have an interest. Statements must also list the names of private companies in Alberta in which the minister, or his or her family, has an interest, and a description of proprietorships and partnerships in which the minister, or his or her family, has an interest must be disclosed. Although there is no definition of "family" in the Legislative Assembly Act, the Premier's policy statement defines family as "minister's spouse and minor children".

The subject of conflict of interest of public servants is dealt with principally in "The Code of Conduct and Ethics for the Public Service of Alberta". This Code applies to all public service employees, including persons hired on a contractual basis under the Public Service Act. The Code expressly permits employees to take supplementary employment, except in cases where it "causes an actual or apparent conflict of interest". Employees have the duty imposed upon them to notify the employer when a conflict of interest might arise. Employees are directed not to accept money or payment in addition to their normal emoluments for public service duties.

An employee must disclose the business or financial interests of himself, his spouse and children under 18 years of

age, where these interests are affected or appear to be affected by the employee's actions and duties as a public service employee. In the case of actual or potential conflict, the business or financial interests may, with the approval of the deputy head, be placed in a blind trust. No employee involved in the sale or purchase of assets for the Crown may acquire or sell such assets without approval. There are no express post-employment restrictions.

Saskatchewan

The Members of the Legislative Assembly Conflict of Interest Act (1980) is oriented towards government contracts, sale or dispostion of land and the lending of money to or from the Crown. The Act states that no Member of the Legislative Assembly (MLA) can participate in a government contract. This precludes an MLA from being beneficially interested in, or a shareholder, partner, director, manager or other officer of a business (or its subsidiary) which has a beneficial interest in a government contract. There are a number of specific exceptions, such as the right to hold certain licences and permits (e.g. to cut hay and timber or to practice veterinary medicine).

MLAs are required to disclose to the Clerk of the Assembly under oath, annually, the nature and extent of any participation in any government contract by the member or any person in his or her family. "Family" is defined as "spouse and any dependent children". Members must also disclose: the name of any business or person that was indebted to the member or his or her family in an amount exceeding $5,000; any right, title or interest in real property within or outside Saskatchewan owned by the member and his or her family; the name of the member or any person in his or her family who was a shareholder, partner, director, manager or other officer of or held an interest in a business beneficially interested in a government contract; and details of subsidies from the Crown. There are some exceptions provided in the Act.

Provision is made in the Act for a fine of not more than $10,000 for contravention of any of its provisions. Failure, on conviction, to cease or remedy the omission entails liability up to a further $10,000 for each day the offence continues. Conviction also brings disqualification of the member. There is no post-parliamentary provision in the Act.

The Public Service Act, by section 51, prohibits an employee from engaging in or undertaking any business or private practice of any profession or trade, whether as principal or agent. There is provision for a fine not exceeding $200 or imprisonment not exceeding three months, or both, for violation of the Act.

The oath of office, dealt with in section 19 of the Act, is to the effect that the employee will not ask for or receive money, services, recompense, or things in return for the discharge of duties, except his salary from the government; nor will he disclose confidential information.

Also relevant to public servants are the Saskatchewan Public Employees Conflict of Interest Guidelines defining conflict of interest as any situation which could result in either an interference with the objective exercise of his or her duties, or a gain or an advantage by virtue of his or her position in the public service. The Guidelines (in addition to the oath of office) also proscribe the acceptance of gifts.

A public service employee must disclose financial assets or investments directly or indirectly connected to the content of the employee's work. The employee must arrange his or her private and financial affairs to avoid conflict or appearance of conflict and must inform the employer when he or she perceives a conflict or the possibility of one. Assets of one's spouse and immediate family must be disclosed where conflict or appearance of it might exist.

The employer, by the same token, can demand full disclosure from a public employee when the former perceives the possibility of conflict of interest. Employees who exercise regulatory, inspection or discretionary control must not give preferential treatment to family, friends or organizations with which the employee is associated.

The Guidelines are concerned with the activities (financial and business) of the spouse of the employee and his or her immediate family. However, subsection E2 of the Guidelines goes beyond this, and gives discretion to the employer to determine if a conflict exists as a result of the interaction of an employee with a "family member" (because family ties vary from family to family). An employee may be required to divest himself or herself of financial interests or transfer such interests to a blind trust.

There is a policy statement that provides that no member of the same family may be employed in the same work unit (with certain exemptions). There is no post-employment provision in the Guidelines except, obliquely, mention of an employee's obligation to avoid being influenced by the prospect of employment elsewhere.

Manitoba

Provisions relevant to elected members in Manitoba are contained in the Legislative Assembly Act, although at the time of

writing we understand a new Bill is pending with reference to conflict of interest.

Under the Legislative Assembly Act no person holding any office, commission or employment or receiving an emolument from the Crown in right of Manitoba is eligible to be an MLA (except that a coroner and justice of the peace are not disqualified from sitting as MLAs). No person is eligible to be an MLA if he or she, directly or indirectly, holds or undertakes a contract with the province. However, section 19 of the Act provides a long list of exceptions. A person who is disqualified by virtue of prohibitions in the Act is liable to a fine of $200 per day while sitting as an MLA.

The Assembly itself may determine imprisonment for breach of section 42 (e.g., taking a bribe). No MLA may receive, or agree to receive, any compensation, directly or indirectly, for services in relation to a matter before the Assembly. If he does, he is liable to a fine of $500.

No barrister, solicitor or attorney, who is a partner of an MLA, shall accept or receive, directly or indirectly, any fee, compensation or reward in relation to a matter before the Assembly. To do so would bring a fine of $500.

The Act contains no reference to an MLA's spouse or minor children, no reference to disclosure or divestment, and no post-parliamentary restrictions.

At the public service level in Manitoba, conflict of interest is addressed by the oath of office. The oath of office states that the employee will not ask for or receive money, services, recompense, or matter or things whatsoever except lawful salary, and that he or she will not disclose confidential information.

Conflict of Interest Guidelines have been drafted by the provincial government and submitted to the public service bargaining agents who had not, as of the time of writing, signified their agreement.

The draft Guidelines are extremely simple and may be augmented by specific provisions for any department. They provide that employees may not engage, directly or indirectly, in personal business transactions for profit which accrues from their official position or is based on confidential information. Employees must not act in any official matter where there is a personal interest incompatible with an unbiased judgement. There shall be no direct or indirect personal business or financial activities which are in conflict, nor shall the employee place himself or herself in a position of obligation in the discharge of

his or her official duties. Disclosure must be made in the case of actual or foreseeable potential for conflict. Employees will be advised, when they seek clarification, of any steps to be taken. The employee's spouse or immediate family are not referred to in the Guidelines. There is no post-employment provision. It would appear that the Guidelines will have application to agencies, boards and commissions, but no reference is made to Crown corporations.

Ontario

For ministers and parliamentary assistants, guidelines were introduced following a statement to the Legislature by the Premier in 1972. At the time, these Guidelines on Conflict of Interest were considered by the Premier to be "broader in scope, far more definitive and precise than any previously enunciated by any comparable jurisdiction ... in Canada or anywhere else".

Ministers and parliamentary assistants, and their spouses and minor children, are prohibited from purchasing directly or indirectly, except for personal use, land or interests in land in Ontario. No private company in which the minister or parliamentary assistant has an interest may become contractually involved with the Government of Ontario. Where a matter involving a personal beneficial interest comes before a ministry, the minister must request that a colleague be officially appointed to act for the ministry in that matter. Ministers must abstain from day-to-day particiation in any business or professional activity.

Public disclosure (i.e., to the Clerk of the Legislative Assembly) must be made of properties owned by ministers or parliamentary assistants and by their spouses and minor children, whether ownership is direct or indirect. "Properties" means land, except that occupied for private residential or recreational use; all shares or debt interests in private companies and land and all partnerships or proprietorships in which they are principals.

Divestment is required with respect to share interests in public corporations, which includes the option of placing them in a blind trust. There is no post-parliamentary provision.

The guidelines for public employees were developed in 1973 and later converted into a regulation made pursuant to the Public Service Act. In a news release in 1973, the Premier said that conflict of interest was "a moral as well as a legal issue".

In addition to the Regulation, there exists an Ontario Manual of Administration which contains a policy on conflict of interest incorporating the spirit and language of the Regulation. The Regulation places the onus on the public employee to perceive, identify and disclose a possible conflict of interest in

situations where the employee might derive "a personal benefit" and "abide by the advice given". Similarly, if his or her outside activities could place him or her in a conflict situation, the employee must disclose and abide by the advice given. Contraventions can lead to dismissal. No public employee may engage in any outside work or business undertaking that interferes with his or her duties, or in which he has an advantage derived from his or her public service employment, or in which his or her (outside) work would otherwise constitute full-time employment, or in a professional capacity that will, or is likely to, influence or affect his public duties. The Premier cited examples including: ownership of land or property where an employee could influence its use or value, and interest in a company held by the employee or his or her immediate family whose dealings with the government could be influenced.

Each minister is responsible for designating particular areas of employee conflict, in the same manner. For example, the Ontario Securities Commission has developed rules concerning investments to guide its employees.

The Ontario Manual of Administration provides that an employee shall, on instruction, divest himself or herself of an outside interest or transfer such interest to a neutral third party (blind trust). "Immediate family" is not defined and no mention is made of "spouse", although one's spouse presumably is regarded as part of the immediate family.

There is no post-employment restriction per se on former public office holders, although, as noted, departments and agencies may impose their own. One commission, for example, imposed a 12-month restriction concerning appearances before the commission to represent persons dealing with it.

The Guidelines apply to Crown agencies.

Quebec

In Quebec there is a law governing conflict of interest for members of the Quebec National Assembly (La Loi sur la législature). In addition, the Premier issued, in 1981, a Directive to Ministers, Parliamentary Assistants and Public Servants concerning the acceptance of gifts.

The Act provides for the disqualification of a member of the Assembly who accepts a payment other than lawful expenses and salary and allowances. There are certain exceptions (e.g., fees received by a medical doctor for services to welfare cases, etc.). No member may be a businessman contracting with Her Majesty or with the Government of Quebec, although the member may hold shares in a corporation doing contractual business with Her

Majesty or with the Government of Quebec with the exception of a company which carries out public works projects. A member of the Assembly risks a fine of $1,000 per day for sitting while disqualified by virtue of infraction of this Act.

In 1981, a directive was given by the Premier to all ministers, requiring them to end all professional commercial or business activity which could be a possible conflict of interest or prevent ministers from devoting all their time to their duties. Ministers are to divest themselves of their interest in companies whose shares are listed on the stock market or for which an over-the-counter market exists. Ministers must ensure that they and their immediate family holding shares in companies do not do business with or receive loans or subsidies from the Government of Quebec. Exceptionally, ministers may engage in business with the government provided there is no derogation from the directive. The Parliamentary Committee on Financial Involvements must be informed of the particulars of the details of such contracts for which an exception is sought.

Having regard to the nature of the duties of a given minister, he or she, and the minister's family may be required to divest themselves of a holding that is not otherwise forbidden. Ministers have 60 days grace if they find themselves involved in such a circumstance which occurred before becoming a minister, or if they found themselves in that circumstance because of marriage, by the application of law, or by succession. This also applies, *mutatis mutandis*, to the minister's immediate family.

A minister or his or her family must not purchase land for speculative purposes, or acquire an interest in property in Quebec or in a real estate development company in Quebec. There are certain exceptions permitted, such as acquisition of land for agricultural purposes. Ministers must disclose annually (including a nil report) to the Secretary-General of Cabinet (Executive Council) details of their shares and those of their spouses and minor children, financial holdings, land, property (in or outside Quebec) except residential property; the name and particulars of creditors, indicating the degree of indebtedness in some circumstances and businesses in which they have an interest. The minister's disclosure statements are available to the public.

The Premier of Quebec also issued a Directive on Gifts to Ministers, Parliamentary Assistants and Public Employees. In essense, the Directive restricts acceptance of gifts to those of "modest value" (under $25) and where the gift is personal and was received at an event in which the person participated. All other gifts must be returned to the donor or sent, as appropriate, to the Ministry of Cultural Affairs or Public Works and Supplies.

There is no post-parliamentary restriction on ministers and parliamentary asssistants in Quebec.

The Public Service Act (Loi sur la fonction publique) of Quebec deals with conflict of interest in section 99. In addition, there is a Regulation dealing with a code or standards of conduct and discipline. (Règlement sur les normes de conduite et de discipline dans la fonction publique et le relevé provisoire des fonctions.) Moreover, public employees are subject to the Premier's Directive of 1975 concerning acceptance of gifts which has the effect of modifying the Regulation. The substance of the Premier's Directive of 1976 has already been discussed above.

The Regulation affects everyone referred to in Article 72 of the Public Service Act and describes failure to conform with its provisions as a disciplinary infraction. According to the Regulation, a public employee is required to perform his or her duties with probity, in a disinterested and impartial manner. The Regulation is a "catch-all", inasmuch as it also deals with work hours, absences, being intoxicated, refusal of work or incitement to refuse work, negligence, faulty work, disobedience, and so forth.

No public employee may solicit or accept a gift (but: see the Premier's Directive of 1976 discussed above, which also applies to public employees), reward, commission, discount, loan, reduction of debt, favour or advantage, nor must he or she use, to his advantage or personal use, information deriving from his or her duties.

No public employee who is a "professional" (defined as a person in a position requiring 16 years or more of study to qualify) may exercise his or her profession except for the Government of Quebec. A public employee must disclose a situation likely to create a conflict of interest. The employer will then indicate the action the employee must take. A deputy minister must make his or her own disclosure to the Premier. An employee intending to publish anything, or to give a press interview concerning the department in which he or she works, must obtain prior authorization.

Section 99 provides that, on pain of dismissal, no employee may have a direct or indirect interest in a business activity which is in conflict with his or her official duties. Such dismissal will not occur if the interest is acquired by inheritance or unconditional gift, provided the employee divests himself or herself of it without delay. The same applies to an assignment, promotion or transfer if he or she renounces it without delay.

Disciplinary penalties for infractions are listed as reprimand, suspension or dismissal. A public employee may also be relieved temporarily of his or her duties with or without pay in the putative case of a serious infraction or criminal infraction or if an emergency situation calls for such action. However, such a temporary suspension is regarded, until clarified, as an administrative, not punitive, action. Where salary is stopped, it may later be restored retroactively. There is no mention of spouse and minor children as such. There is no post-employment restriction.

At the time of writing, legislation had been introduced in the Quebec National Assembly dealing extensively with the Quebec Public Service.

New Brunswick

The Conflict of Interest Act (1978) of New Brunswick governs the conduct of the Executive Council (ministers), deputy ministers, MLAs, heads of Crown corporations, and executive assistants to ministers.

A member of the Legislative Assembly may not hold office in or receive an emolument from the Government of New Brunswick. He or she may not hold a full-time position with the Government of Canada; be a shareholder or be involved in any contract or agreement with Her Majesty, or any public office with respect to the public service of New Brunswick under which public money is expended (with specified exceptions, such as the receipt of superannuation, Old Age Assistance, or money which is paid to the public generally or to specific classes of the public); nor may he or she be a surety or a guarantor for any person party to a contract with the Government of New Brunswick. An MLA is permitted certain defined activities and employment outside the Assembly (e.g. notary, justice of the peace, coroner, member of Her Majesty's Armed Forces, and so forth, as specified in the Act) or may accept a salary or benefit from a registered political party of which he or she is a member.

Ministers, who are subject to these restraints and prohibitions as well, may not carry on business, except as determined by a judge appointed under the Act. Nor may a minister accept fees, gifts, gratuities or other benefits which could influence his or her decisions. A minister may not be involved with any office or position where the duties could interfere with his or her ministerial duties.

Executive staff (to ministers) are governed, mutatis mutandis, by the same restraints and prohibitions as apply to MLA's and ministers. Deputy ministers and heads of corporations are governed, mutatis mutandis by the same restraints and prohibitions as apply to MLA's and ministers.

All classes of people covered by the legislation, except MLA's, may in closely defined circumstances as set out in section 6, engage in, or be associated with, certain contracts with the Government of New Brunswick notwithstanding the other provisions of the Act.

Disclosure under oath is mandatory under the Act. Such disclosure must be made to a judge of the Court of the Queen's Bench of New Brunswick and must furnish information pertaining to the involvement of the MLA, minister, deputy head, head of a Crown corporation or executive assistant, or the involvement of their spouses or dependent children with, or ownership of real and personal property, business and financial involvement (with certain exceptions) of a personal nature and property in blind trust. The judge must examine the disclosure statements and may inquire into them.

A designated judge must make a report upon the application under oath of any person that there has been non-compliance with the Act. Where a judge finds a conflict of interest he or she is required to direct the person to comply with an order to remedy the conflict (through divestment, return of a gain, resignation of employment or other means). For violations of the Act, a fine of up to $10,000 or imprisonment for up to one year may be imposed. Also, a court may prohibit a person from holding an office or position for such period as the court prescribes. There is no post-parliamentary restriction under the Act.

With respect to the public service, it will already be noted that deputy ministers and heads of Crown corporations are governed by the Conflict of Interest Act (1978). For the public service of New Brunswick, a Conflict of Interest policy was enunciated in 1981 based on the general rule that an employee must not engage in any business or transaction of a financial or personal nature that would compromise the fair and honest discharge of the employee's official duties. Subscription to the principles of the Conflict of Interest Policy is a condition of employment. There must not be, nor appear to be, any conflict between the private interests of the employee and the employee's responsibility to the public. The policy interdicts the conferring of a benefit on the employee or relatives, friends or associates; revealing confidential information; accepting a reward, gift or favour; or using the employer's property or lands for unofficial purposes.

An employee may also be required to make sworn disclosure listing business, commercial or financial interests of the employee, spouse and dependent children, except certain personal property (such as primary residence, automobile, domestic

items, trust and bank certificates). The disclosure statement is filed with the Senior Executive Office and is kept confidential.

Public employees' duties may be such as to prohibit "outside" employment which is detrimental to the public interest. Prior approval must, therefore, be obtained before an employee considers "outside" employment.

Infractions may entail disciplinary action, including dismissal. There is no post-employment restriction. Crown corporations are governed by the policy.

Nova Scotia

For elected office holders in Nova Scotia, the House of Assembly Act provides, in section 21, that no person who holds office in the service of the Government of Canada or the Government of Nova Scotia to which any salary or wage is attached, is eligible as a member of the House of Assembly.

Section 22 of the Act stipulates that, except as otherwise provided in the Act, no person holding or enjoying, undertaking or executing, directly or indirectly, alone or with another, by himself or by the interposition of a trustee or a third person, any contract or agreement with the Government of Nova Scotia, or with any minister or department of the government, for which any public money of Nova Scotia is to be paid for any service, work, matter or thing, is eligible as a member of the House or to sit or vote therein.

As in other provinces, the general prohibitions are softened by a number of exemptions. A member of the House may, without becoming disqualified, be a member of the Armed Forces; in receipt of a pension or wartime-incurred disability allowance; a justice of the peace, stipendiary magistrate, notary public, commissioner of oaths, prosecuting officer, coroner, executor, administrator or trustee; a shareholder in an incorporated company having a contract or agreement (with the Government of Nova Scotia) except for a public work; a contractor for the loan of money to the Government of Nova Scotia, proprietor of, or otherwise interested in any newspaper in which Nova Scotia government official advertisements are placed; a surety for a public officer; a member of any medical board or commission of any hospital; a party to any contract or agreement of a casual nature for the supplying of any service or work; a temporary or part-time employee for the governments of Canada and Nova Scotia where special qualifications are required.

The penalty for sitting as a Member while disqualified is $1,000 per day, recoverable through the Supreme Court of Nova

Scotia. Breach of (public) trust is addressed in Part III of the Act, and one is liable to five years imprisonment.

A Member is in violation of the Act if he or she accepts a bribe to influence him or her and is liable to imprisonment while the House is sitting, in addition to any other penalty to which he or she is liable under law.

No member of the House, and no barrister or solicitor in partnership with a member, shall accept or receive, directly or indirectly, any fee or reward in respect to promoting any bill or resolution to the House. The penalty for violation is $200, in addition to the fee or reward received by him or her.

There is no provision for disclosure or divestment, no reference to spouse or immediate family, nor any post-parliamentary restriction in the House of Assembly Act.

The Public Service Act of Nova Scotia contains no reference to conflict of interest, directly or indirectly. The Civil Service Act permits, by virtue of section 35, employees who are not designated in the regulations, to be elected to municipal office or a school board, if such service does not interfere with the performance of their duties, or conflict with the interests of Her Majesty.

Prince Edward Island

The Legislative Assembly Act of Prince Edward Island provides that no person is eligible to be a member if he or she holds office (with compensation) with the Government of Canada or of Prince Edward Island. However, a member may be a public school teacher, a member of the Armed Forces, sit on (specified) hospital boards, and hold shares of any company. A member may not, directly or indirectly, hold a contract or agreement with Her Majesty where public money is paid for service or work. Nor shall he or she become surety for such contract. The penalty for doing so is disqualification as a member. If a member sits in the legislature while disqualified, he or she forfeits $250 per day.

The Civil Service Act of Prince Edward Island does not address conflict of interest matters as such. The oath of office, however, states that the employee is not to ask for or receive money, services or recompense whatsoever, except salary by law. The government has twice endeavoured to have conflict of interest provisions written into legislation, but has not had the bill passed. A House Committee is, we are informed, examining the subject. There is no disclosure or divestment requirement, no post-employment restriction, nor any reference to a public employee's family, in the few rules which do apply. Crown

corporations do not have conflict of interest guidelines imposed by the government.

Newfoundland

Ministers in Newfoundland are governed by the Conflict of Interest (Ministers) Guidelines, 1983, made under the Conflict of Interest Act, 1973. Also governed by the Guidelines (Newfoundland Regulation 310/82) are parliamentary assistants, special assistants to the Premier, and parliamentary secretaries to ministers.

Under the Guidelines, a minister must not use his or her office to gain preferential access to benefits from government, must not own shares in a company, have an interest in a partnership or other association engaged in oil and gas exploration, engage in mineral exploration or land speculation, or conduct land speculation in his or her own name. Any such interests must be disclosed to the Premier. Disclosure applies equally to interests held by the minister's spouse or minor children.

A minister may not make personal use of privileged information. No employment, office or position may be held, including self-employment, outside a minister's duties, which conflicts with the performance of his or her ministerial duties. A minister must not allow his or her plans for future employment to influence the performance of his or her duties. A minister must disqualify himself or herself from exercising all regulatory, inspection or discretionary functions in matters involving the minister or a relative, including matters such as contracts, land grants and leases or financial assistance for commercial purposes by way of grants, loans, guarantees or subsidies. A declaration for disclosure purposes must be made by each minister of his or her active association with private interest groups, and the minister must disqualify himself or herself from participating in any government decision regarding such groups. No gift, favour or service may be accepted from persons having dealings with the Government. The Premier may, in a particular situation, take action to require a minister, his or her spouse or minor children, to divest, or place interests in an approved trust. The Guidelines apply to the minister, the spouse and minor children for one year after the minister ceases to hold office.

Under the Conflict of Interest (Public Employees) Regulations, 1982, made under the Conflict of Interest Act, disclosure is required of "business, financial or property interest of a public employee, his or her spouse and minor children and with any person within one degree of relationship by marriage, adoption or consanguinity of that public employee or of his or her spouse. A public employee shall not, without the

permission of his or her department head, participate in any official action concerning any interest disclosed or required to be disclosed."

A public employee and his or her spouse or minor children are not, while he or she is employed and for one year thereafter, eligible to hold a government contract which pertains to the department or agency with which he or she is or was last employed.

Land speculation or development, exploration for oil and gas in regulated areas and mineral exploration are interdicted.

A public employee may not use privileged information for personal reasons. Outside employment, office or position, including self-employment, is not permitted if it conflicts or causes interference with the performance of public duties. A public employee must not allow the performance of his or her official duties to be influenced by plans or offers of future employment. A public employee must disqualify himself or herself in certain circumstances from participating in a process or exercising a function where to do otherwise might be to give preferential treatment and must report this to the department head.

The department head has power to require the public employee (including spouse and minor children) to divest or to cease outside employment. The department head may also transfer the public employee, impose discipline, or recommend dismissal.

Crown corporations are subject to the Regulations.

Yukon

To date, a written code in the Yukon pertains only to members of the Executive Council (ministers). There is no statute. The "Executive Council Code of Conduct Regarding Conflict of Interest" was introduced following a statement in the Legislature by the Government Leader, Mr. Pearson, in April, 1981. Although the Code applies also to the minister's spouse and dependents living with him or her, it has no application to MLAs. The Code identifies three principal areas of concern: (1) contracts with the Yukon Government; (2) business and professional activities in the Yukon; and (3) financial interest and positions in corporations and other bodies in the Yukon. The principal objective is to enforce what the Government Leader called a "no contract" rule which prevents ministers and their families (as defined above) holding contracts with the Yukon Government, except in certain limited defined circumstances.

A minister must make annual disclosure of holdings, business and financial interests held by him or her and family, including family employment in any such enterprise. The only specific reference to divestment pertains to existing contracts with the Yukon Government still held by the minister, or his or her family, at the end of six months after the minister's appointment to the Executive Council.

No minister or member of the Assembly or his or her family, may purchase or sell land to or from the Yukon Government, except on expropriation or approval of the price by a judge of the Supreme Court.

No person in the minister's family may take a position in the minister's administration. There must be filed, annually, a statement of who in the minister's family is employed by the Yukon Government and the position held.

The minister is not prevented from engaging in "outside" employment, business or professional activity where there is no ostensible conflict and provided such "outside" involvement is not day-to-day in nature and provided it does not interfere with his or her duties. (The Government Leader's statement suggests that this exception to the general rule pertains to operation of a family business.)

The Code imposes no post-parliamentary restriction.

The Public Service in the Yukon is governed by the Government of Yukon Policy Directive, 1/39, called Public Service Conflict of Interest Guidelines (1978). Also pertinent is section 194 of the Public Service Commission Ordinance, which deals with contracts. Under the Guidelines, public servants are directed not to place themselves in a position of obligation to any person who might benefit from special treatment. They should not have a pecuniary interest that could conflict with the discharge of their official duties and no conflict should exist or appear to exist between private interests and their official duties. Upon appointment, a public servant is expected to arrange his or her private affairs to prevent conflict of interest arising. Care must be taken in managing private affairs not to benefit (or appear to benefit) from use of official information.

A public servant should not place himself or herself in a position where he or she could derive direct or indirect benefit or interest from government contracts. No public servant directly, in his or her own name or through another person "may bid upon, tender for, accept or enter into any contract with the Territory". (This section in the Guidelines is the same wording as section 194 of the Public Service Commission Ordinance.)

The holding of outside office or employment that could place on a public servant demands inconsistent with his or her duties is prohibited. No preferential treatment may be given to relatives, friends or organizations with which the public servant is associated. All business, commercial or financial interests where they might conceivably be construed as in actual or potential conflict must be disclosed as must any possible conflict of interest arising from his or her outside activities. A public servant must abide by the deputy head's advice concerning conflict of interest situations.

Deputy heads have the added responsibility for themselves to be so scrupulous in obeying the law that their actions will bear the closest public scrutiny.

There is no post-employment restriction.

Northwest Territories

The Council Ordinance (1970) in section 16.1 deals with conflict of interest.

A Member of the Territorial Council (legislature) must disclose his or her pecuniary interest, whether the interest is direct or indirect, in any matter under consideration by the Council of the Northwest Territories. Disclosure means that it is entered in the Minutes of the Council (so that it is public). Disclosure also pertains to the interests of a dependent spouse, son, daughter or other relative who has the same home. There are certain minor exceptions to disclosure.

A member is considered to have an indirect pecuniary interest in any matter in which the Council is concerned, if that member (or his or her nominee): is a shareholder, director or senior officer of a private corporation; has a controlling interest (10% of voting rights) or is a director or senior officer of a public corporation; is a member of a body having a pecuniary interest in such a matter; or is a partner or employee of a person who has a pecuniary interest.

A member guilty of contravention of section 16.1, unless through inadvertance or bona fide error, may be disqualified by a court and have imposed upon him or her a fine not exceeding $5,000. This section makes no overt reference to divestment, but it is inherent in the language of the text. There is no post-parliamentary restriction.

Conflict of interest in the Public Service and Crown corporations is addressed in three ways by the Northwest Territories Government; section 49 of the Regulations (1967) under the Public Service Ordinance; the Conflict of Interest Directive

(Personnel Manual - 1983) and the provisions contained in two collective agreements.

The Regulations are extremely brief. The two collective agreements pertain to the Public Service Association and the Teachers' Association. The provisions of these agreements are similar in purpose and embody recognition that certain forms of "outside" employment are undesirable. Also, employees are required under each agreement to notify the employer (Government) of the nature of such outside employment.

The Conflict of Interest Directive (1983) would seem to have universal application, notwithstanding the language of the two collective agreements. The Conflict of Interest Directive is not stated to apply to an employee's family.

Under the Directive, no employee can carry on any business or employment outside the public service which would entail a conflict of interest. Nor can any employee carry on a business in which he or she exploits unduly and for personal gain his or her acquaintance with other public service employees. No employee is to request or accept a payment or benefit for functions which are part of his or her public duties.

A senior officer (defined) must covenant under the Directive that during a period of one year of post-employment he or she will not use knowledge and information obtained while a public service employee to cause loss to the Northwest Territories Government or to benefit himself or herself. The covenantor may also be enjoined (during the same year following his or her termination) from purchasing or obtaining interest in a certain business activity (specifically defined in relation to him or her). Additionally, a senior officer may be required to undertake not to operate a certain type of business or be employed in it. The Directive provides that no senior officer can be an officer or a director of a company holding a contract (involving remuneration) with Her Majesty, or with the Commissioner of the Northwest Territories.

Public service employees below senior officer level are not required to sign a covenant, and for them, therefore, no post-employment requirement exists.

(c) The Municipal Level

It is at the municipal level in Canada where by far the largest body of law and jurisprudence exists with respect to conflict of interest matters. The Municipal Acts or similar statutes in each province and in the two territories for many years have contained provisions relevant to ethical conduct on

the part of elected representatives, and recent practice is to develop rules that are also applicable to municipal employees.

Statutory provisions governing pecuniary conflict of interest problems in the case of Ontario, for example, date to the first comprehensive Municipal Act passed in 1849 (the Baldwin Act) which stipulated:

> no person receiving any allowance from the Township, Country, Village, Town or City (except in the capactiy of Councillor, or in capacities incident thereto), and no person having by himself or partner any interest or share in any contract with or on behalf of the Township, County, Village, Town or City in which he shall reside, shall be qualified to be, or be elected alderman or councillor for the same, or for any ward therein.

Today a number of provinces have chosen to enact separate statutes governing conflict of interest problems at the municipal government level, such as an Act to Prevent Conflict of Interest in the Conduct of Municipal Government enacted in Nova Scotia in 1982, an Act respecting Municipal Bribery and Corruption in the Province of Quebec, the Municipal Conflict of Interest Act, 1983, in Ontario, the Municipal Council Conflict of Interest Act passed in 1983 in Manitoba. In other provinces provisions dealing with the same subject are contained in the Municipal Act or some other statute.

Generally speaking, these provisions are intended to govern the conduct of members of municipal councils, requiring disclosure of conflicting interests on matters before council, and prohibiting members from speaking to or voting on such matters in which they have financial interests. In some instances, the statutes pursue the matter with considerable thoroughness, as, for example, in the Municipal Conflict of Interest Act in Ontario where "the pecuniary interests, direct or indirect, of a parent or the spouse or any child of the member shall, if known to the member, be deemed to be also the pecuniary interest of the member" and where, moreover, a spouse is defined to include a common-law relationship of five years or more duration.

In examining conflict of interest rules at the federal level, in the provinces and in the two territories, we described the rules applicable to private members of the legislative body, since such rules establish minimum standards with which ministers and parliamentary secretaries must comply. Otherwise, concern for rules governing ethical conduct of members of Parliament are

outside the terms of our mandate. At the municipal level, of course, there is no exact parallel, so we will not go into detail about the conflict of interest rules governing elected municipal representatives.

We would, however, make two observations based on our review of municipal conflict of interest provisions in Canada. First, it is apparent from the way most provincial legislatures have enacted provisions to regulate this subject, that concern for conflict of interest problems at the municipal level is profound. It seems the risk of problems arising at the municipal level is great, given the large number of highly specific matters local councils must deal with (licensing, zoning, building permits and development approvals) which can give rise to sharply focused efforts by interested parties to influence members of council. Combined with this is the fact that many local councillors come with little political experience to their task on council and may be unaware of the pitfalls to be avoided in dealing with subjectively interested parties. Another factor is that municipal elected officials in most communities have other jobs, businesses or professional associations, so that in addition to their part-time council work they have continuing interests in the business activities of their community. These factors generate a number of potential conflict of interest problems, and the provincial legislatures have seen fit to lay down a fairly specific legal framework within which elected municipal officials must conduct themselves.

Second, the existence of numerous conflict of interest laws, over many decades, has given rise to a significant body of jurisprudence. A few general principles seem appropriate to bear in mind in the context of this report and the recommendations contained in it.

The justification for the rules governing the conduct of municipal officers both at common law and under various provincial statutes, has been stated as follows: "The plain principal of justice, that no one can be a judge in his own cause, pervades every branch of the law, and is as ancient as the law itself."1

The underlying rationale for restrictions upon eligibility for municipal office and upon participation in the affairs of municipal government while in office is that those who

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1. Paley on Summary Convictions, 7th ed., p. 43 cited by C. Boyd, in Re: l'Abbé and the Corporation of Blind River (1904) 7.O.L.R. 230 (Ont. Div. Ct.) at 231.

have a personal interest in a particular matter may be incapable of acting with complete objectivity toward that matter. In other words, there is likely to be a bias on the part of a person who, for some reason, has an interest in the outcome. A precise definition of such an interest and the extent of the restrictions imposed upon public officers is set out below.

It has been long recognized that bias in the judicial process offends principles of natural justice:

> In the administration of justice, whether by a recognized legal Court, or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased.[2]

The same principles apply to government. The likelihood of a public official, especially in local government, being faced with a position of conflict is inherently great and unavoidable. Decisions about land use, operating licenses and road allowances are made by those who are closest to the scene. It is inevitable that local representatives will have personal interests in some matters coming before them. The potential for bias has, in many jurisdictions, been recognized by statutes whose purpose it is "to prevent the conflict between interest and duty that might otherwise inevitably arise".[3]

At the same time, it has been recognized that the accessibility of public office should not be unnecessarily restricted:

> ...(The) right of being chosen to represent his fellows in a representative body, Parliament, Legislature, municipal council, is one of the dearest possessions of a freeman, and it should not be taken away without clear statutory direction.[4]

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2. Per Lord Esher, M.R. in Allinson v. General Council of Medical Education and Registration, (1894), Q.B. 750, at 758.

3. Nutton v. Wilson (1889), 22Q.B.D.774, at 748.

4. Rex ex rel. Scroggie v. Robb (1925), 57 O.L.R.23, at 25.

Typically, municipal council members are required to make disclosures of their interests and refrain from participation in the consideration of matters coming before council in which their interests may be involved. The purpose of legislation in this area is to promote objective decision-making and not to ensure that representatives vote against their own interests:

> The object of (the Act) is clearly to prevent councillors from voting on a matter which affect their own pockets and, therefore, may affect their judgement, and a councillor's judgment may be affected by the proposal to preserve his liability just as much as by a proposal to terminate it, particularly where other persons in a like situation are being relieved from from the same liability.[5]

It is no defence then, for a municipal councillor to assert that he was not moved by a desire to better his interests as this is not what is demanded of public officials:

> It is no defence, then, for a municipal councillor to cast his vote for the question or against it. He may have voted favourably to his pecuniary interest or he may have "leaned over backward" and voted against it. The latter course may be acceptable morally, but it does not achieve the disinterested consideration of the question on its merits, which the elector is entitled to expect, and to receive, from his representatives, and which the statute commands.[6]

Similarly legislation in this area does not seek to punish the corruption of public officials, nor does its operation depend upon a finding of corruption. Rather, it seeks to guarantee openness in the conduct of municipal affairs.

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5. Brown v. Director of Public Prosecutions (1956) 2All E.R. 189 (Q.B.), at 192.

6. Re. Guimond and Sornberger (1980), 115 D.L.R. (3d) 321 Alta, C.A.), at 330. See also Beaulieu v. Brisson (1948), C.S. 447; Guibord v. Dallaire (1931), 50 B.R. 440.

> There is no need to find corruption on (the councillor's) part or actual loss on the part of the council or board. So long as the member fails to honour the standard of conduct prescribed by the statute, then, regardless of his good faith or the propriety of his motive, he is in contravention of the statute.[7]

There are saving provisions in many statutes relating to a "bona fide error in judgement" on the part of a councillor. This however, does not afford a blanket "good faith" defence to the requirements of such statutes.

Aside from disclosure of personal interests and restrictions upon participation in municipal affairs, some statutes also prohibit local public representatives from entering into contractual relations with the municipal corporation of which they are members. Such a contract would be inherently suspect as involving a conflict between a person's public duty and his private interest. As such, contractors with municipalities are often disqualified from holding local office.[8]

Legislation does not catch all forms of apprehended bias; neither does the common law. Frequently, public officials are elected solely because of their inclinations toward certain interests and issues. This has been recognized as an inherent feature of democracy, and beyond the reach and concern of the law:

> The activities of seeking election of necessity require the aspirant to office to declare himself on issues thought to be of public interest, and indeed the forcefulness with which his views are expressed, even the narrowness of his outlook, may hold attraction for voters. This is part of the democratic process on which municipal government is founded. When elected, a failure on his part without good reason to adhere to the views and opinions he has publicly

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7. Re Moll and Fisher (1979), 97 D.L.R. (3d) 506 (Ont. Div. Ct.), at 509.

8. Marcoux v. Plante, (1976) Que. Q.B. 742, a decision under the Municipal Bribery and Corruption Act R.S.Q. 1941, c. 214.

> expressed may result in a feeling of distrust of him on the part of the public, even cynicism for the democratic process. These are factors which in my view are of prime importance, and must be accorded a place in judging attitudinal bias on the part of members of a municipal council.[9]

Thus, the purpose of legislation that seeks to restrict participation in municipal affairs by interested parties and to limit eligibility for local office generally, is merely to ensure that matters coming before municipal councils are given disinterested consideration on their merits. It does not attempt to prevent candidates from holding firm views on municipal issues outside of the realm of their material interests.

(d) United Kingdom

In the United Kingdom, there has generally been reliance on unwritten rules and customs to avoid conflict of interest. Members of Parliament are not extensively limited in terms of their outside employment or business interests and, in contrast with the United States, are not governed by a comprehensive code of conduct. As noted with respect to the British approach, "It is only to restrict the more odious practices that Parliament has seen fit to adopt resolutions or establish statutory rules. Even these rules are not extensive and in many cases have deliberately avoided precision".[10]

However, it must also be pointed out that there is a long tradition of dealing incrementally with questions of conflict of interest in the United Kingdom. For example, a House of Commons resolution of 2 May 1685 defined the acceptance of a bribe by an MP to be a "high crime and misdemeanor". Likewise, rules in regard to other forms of conflict of interest were developed over the years and have been added to British parliamentary tradition. In this regard, the English approach to conflict of interest is analogous to the common law.

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9. Re. Campeau Corporation and the City of Calgary (1980), 112 D.L.R. (3d) 737 (Alta. C.A.), at 751.

10. The Honourable Allan J. MacEachen, President of the Privy Council, Members of Parliament and Conflict of Interest. (July, 1973) Ottawa, p. 10.

One of the major reasons for the difference between the approaches of the United Kingdom and the United States is the history of greater careerism both in politics and bureaucracy in the U.K. This difference has been explained in these terms:

> The close links between the Government and Parliament in Britain and the doctrine of ministerial responsibility to Parliament has developed a tendency for political Ministers also to be career politicians. Unlike the United States practice, they are not usually men secured from business or industry, for example, to join an administration for the duration of its existence with the intention of returning to their extra-governmental interests at the end of the administration's tenure of office.
>
> The insulation of the career politician in Britain, however, is less than complete because members of Parliament themselves are expected to carry on extra-parliamentary careers to supplement their incomes.[11]

A somewhat similar situation exists with regard to the British Civil Service in that reliance has not been placed on a comprehensive code of conduct; but rather faith has been placed in self-discipline on the part of the bureaucracy.

While British practice relies on legislation dating back to the turn of the century, for the most part the conduct and discipline of the civil servant in Britain is laid down in regulations made by the Treasury Department. These regulations have been devised and are administered by the Civil Service itself.[12]

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11. Research Branch, Library of Parliament, Ottawa (February 13, 1981) Conflict of Interest Regulations in the United States, United Kingdom and Canada, pp. 16-17.

12. G.P. Wilson, "Conflicts of Interest in Public Law in England", Proceedings of the 6th International Symposium on Comparative Law held in Ottawa, August 28-30, 1968, Faculty of Law, University of Ottawa, University of Ottawa Press, Ottawa, 1969. pp. 318-9. Referred to in ibid., p. 27.

The general principles of the conduct of British civil servants stem from a study in 1928. This enquiry advocates the view that the Civil Service can and should discipline itself. Paragraph 55 of the enquiry's report states that:

> ...the Civil Service, like every other profession, had its unwritten code of ethics and conduct for which the most effective sanction lies in the public opinion of the Service itself ...[13]

In the same vein, paragraph 59 states:

> We content ourselves with laying down these general principles, which we do not seek to elaborate into any detailed code. ...Practical rules for the guidance of social conduct depend ... as much upon the instinct and perception of the individuals as upon cast-iron formulas... [14]

G.P. Wilson indicated that the British approach has always relied on the discretion and judgement of civil servants. This approach places a great deal of faith in individual civil servants as well as department heads.[15]

The 1928 report also sets out the general rule on conflict of interest as follows.

> A Civil Servant is not to subordinate his duty to his private interests; but neither is he to put himself in a position where his duty and his interests conflict. He is not to make use of his private affairs as to allow the suspicion to arise that a trust has been abused or a confidence betrayed ... [16]

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13. Quoted in Research Branch, Library of Parliament, op. cit., p. 28.

14. Ibid.

15. Wilson, op. cit., p. 320. Referred to in ibid., p. 29.

16. Quoted in Research Branch, Library of Parliament, op. cit.

More specific rules regarding conflict of interest applying to civil servants appear in various statutes, orders-in-council, Treasury circulars, etc. Moreover, many of the restrictions imposed by these rules are quite loose compared to those of the United States. For example, where a civil servant is involved in the issuance of a government contract, he must reveal this fact to his department head so that another individual can be assigned to the case in question. However, there is no absolute prohibition on a civil servant entering into contracts with his own department. Such contracts would have to be approved by the department head, which is probably unlikely, but nonetheless quite possible and is contemplated by the rules.[17]

The most extensive rule appears to be that on post-employment activities. However, even here, the difference with the more restrictive American regulations is dramatic. The British policy on post-employment activities originated in a "Memorandum on the subject of the Acceptance of Business Appointments by Officers of the Crown Services" dated 1937. This policy states that civil servants at senior levels must obtain the assent of the government before accepting offers of employment with business or other bodies:

> (a) which are in contractual relationship with the government;
>
> (b) which are in receipt of subsidies or their equivalent from the government;
>
> (c) in which the government is a shareholder;
>
> (d) which are in receipt from the government of loans, guarantees or other forms of capital assistance; or
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> (e) with which services, or departments or branches of government are, as a matter of course, in a special relationship;

and in semi-public organizations brought into being by the government or Parliament.[18]

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17. Ibid., p. 29.

18. "Acceptance of Outside Business Appointments by Crown Servants," in Report of the Royal Commission on Standards of Conduct in Public Life, 1974-76, p. 193.

This policy has remained the same since its inception. In 1975, Prime Minister Wilson, after stating that the rules were satisfactory, made two additions. First, a standing advisory committee was established and, second, a three-month "cooling-off" period was established before a civil servant could take up his outside position.

It is worthwhile to note that a 1968 memorandum from Treasury to the Royal Commission on the Civil Service stated that although permission to accept outside employment has rarely been refused, "public complaints about particular appointments has (sic) been avoided."[19] Notwithstanding the lack of public complaints, there is no absolute prohibition against "switching sides". Approval can always be granted and usually is. Moreover, the three-month cooling off period is extremely short in light of the two-year period in the United States and Canada. Lastly, these restrictions apply only to very senior levels (under-secretaries and higher).

Extensive guidelines on several areas of ethical conduct are contained in two documents, namely, the Civil Service Pay and Conditions of Service Code, which essentially contains rules and instructions for all employees, and Establishment Officers Guide, which provides managment with guidance parallel to, but fuller than, the Code. These two documents recently replaced the old and well-known document called Estacode.

(e) Australia

In Australia, Members of Parliament are governed by the standing orders of the two houses. Members of the House of Representatives cannot vote on issues in which they have a direct pecuniary interest not held in common with the rest of the subjects of the Crown. In reality this restriction is not significantly limiting since a holding in a widely held pecuniary interest will not disqualify a Member's vote.

> Before a Member can be prevented from voting, it must be shown that his pecuniary interest is direct and personal and not one which is shared in common with many others. Members who held large blocks of railway shares were not prevented from voting, in 1947, against a bill seeking to nationalize

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19. Research Branch, Library of Parliament, op. cit., p. 31.

> railways because the financial interest involved was not limited to them but was spread widely over a large section of the citizenry.[20]

A more limiting regulation is contained in Standing Order 326:

> No member may sit on a committee if he is personally interested in the inquiry before such committee.[21]

A similar regulation is set forth in the Standing Orders of the Australian Senate.[22]

However, even these regulations have not proven in practice to be all that strong. To begin with, only the Houses, not individual committees, have the power to prevent a member from taking part in committee hearings. And in one case where a member appeared to have a personal (although not financial) interest in a matter before a committee, the Speaker of the House of Representatives refused to make a definitive ruling, stating:

> In my opinion the Chair is not able to determine whether or not a member is personally interested in a committee's inquiry and cannot properly be called upon to so decide. A member must be guided by his own feelings in the matter and by the dictates of respect due to the House and to himself. Having regard to the existence of the standing order and its terms, it is likely that if a matter of this kind is brought to issue it will be one for the House to decide.[23]

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20. Research Branch, Library of Parliament, "Conflict of Interest Rules for Parliamentarians in Australia, France and the Federal Republic of Germany", Ottawa, 27 April 1979, p. 3.

21. Standing Order 326 of the Standing Orders of the House of Representatives, op. cit., p. 65.

22. Standing Order 292 of the Standing Orders of the Senate, J.R. Odgers, Australian Senate Practice, Canberra, The Commonwealth Government Printer, 1977, p. 283.

23. Debates in the House of Representatives of Australia, Canberra, 19 September 1963, p. 1178.

The Government, in response, did not press the issue but expressed some disapproval.[24] In spite of this, the Member decided to sit on the Committee.[25] Similarly, the Attorney General in 1970 advised Senators that they would have to determine whether they were in a conflict of interest of this nature and how they should act. Since 1976, Australian ministers have been required to record their pecuniary interests with the Prime Minister's Office. However, this information is kept confidential, and there is thus no public disclosure.[26]

In general, we conclude that although Australia has regulations on conflict of interest in place, either the regulations themselves are not terribly restrictive or they have not been enforced notably strictly. As regards Australian public servants, the primary regulatory document is the Code of Conduct which was endorsed by the Government. This Code sets forth ten general principles, some of which are as follows.

(1) An office holder should perform the duties of his or her office impartially, uninfluenced by fear or favour.

(3) An office holder should avoid situations in which his or her private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with his or her public duty.

(4) When an office holder possesses, directly or indirectly, an interest which conflicts or might reasonably be thought to conflict with his or her public duty, or improperly to influence his or her conduct in the discharge of responsibilities in respect of some matter with which he or she is concerned, he or she should disclose that interest according to the prescribed procedures. Should circumstances change after an initial disclosure has been made, so that new or additional facts become material, the office holder should disclose the further information.

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24. Ibid.

25. Research Branch, Library of Parliament, op. cit., p. 6.

26. Ibid., p. 9.

(5) When the interests of members of his or her immediate family are involved, the public office holder should disclose those interests, to the extent that they are known to him or her.

(6) When an office holder possesses an interest which conflicts with the duties of his or her office and such interest is not prescribed as a qualification for that office, he or she should forthwith divest himself or herself of that interest, secure his or her removal from the duties in question, or obtain the authorization of his or her superior or colleagues to continue to discharge the duties.

(10) An office holder should not allow the pursuit of private interest to interfere with the proper discharge of his or her public duties.[27]

As in Britain, great emphasis is put on self-discipline.

> The code emphasises the importance of self-regulation in matters of conflict of interest. The onus is on the individual to be alert to any actual or potential conflict of interest, pecuniary or otherwise; to neglect to observe the principles set out in the Code may constitute misconduct and so may give rise to disciplinary action under the Public Service Act.[28]

Some other regulations include the requirement of public servants to obtain approval of the Public Service Board for any external employment they may take[29], the prohibition against using any official information for non-official purposes[30] and the prohibition against the solicitation or acceptance of gifts

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27. Public Service Board, Personnel Management Manual (Vol. 3), "Guidelines on Official Conduct of Commonwealth Public Servants", Canberra, 1982, pp. 25-26.

28. Ibid., p. 26.

29. Ibid., pp. 25-26.

30. Ibid., p. 29.

connected with official duties.[31] In addition, post-employment regulations very similar to those in the United Kingdom have been adopted.[32]

(f) New Zealand

New Zealand appears to have fewer conflict of interest regulations than any of the other jurisdictions which we have examined. The material at our disposal indicates no policy, for example, on post-employment activities.

A restriction on outside employment similar to that in Australia is contained in section 53 of the State Services Act. This section also places a restriction of sorts on the financial interests a public servant may hold.

> An employee is not prevented from becoming a member or shareholder only of any company or society or persons registered under any Act.
>
> Where, however, an employee's financial interest (including any equitable interest) in any undertaking is, in the opinion of the Commission, incompatible with the due and proper discharge of his/her official duties, the employee may be called upon to dispose of any such interest.[33]

It is interesting to note that there does not appear to be any requirement for public servants to disclose any of their financial holdings.

The only other regulation that falls within our consideration of conflict of interest (outside of political activity) deals with the acceptance of gifts or presents. The Public Service Manual states:

> An employee shall not, directly or indirectly, solicit or accept gifts or

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31. Ibid.

32. Ibid., pp. 33-4.

33. State Services Commission, Public Service Manual (Section L) "Conduct of Employees," L 43. See also State Services Act 1962 s. 53 (2)-(3).

> presents from any member of the public concerned, directly or indirectly, with any matter connected with the duties of the employee or in connection with the Public Service...
>
> An employee shall not demand any fee, rewards, gratuity or remuneration of any kind whatsoever, other than salary and allowances, for services performed or to be performed by the employee, either in or out of the usual hours of employment, in connection with the Public Service.[34]

It is apparent that the government of New Zealand has not viewed it as being necessary to develop an elaborate or extensive set of guidelines on conflict of interest.

(g) The United States of America

In 1978, Congress passed the Ethics in Government Act, calling for the creation of the Office of Government Ethics, a special unit within the U.S. Office of Personnel Management charged with responsibility for overseeing the federal executive branch ethical standards program. In particular, the Office of Government Ethics is responsible for the prevention of potential conflicts of interest situations in which government employees may be torn between their duty to serve the public impartially and the possibility of personal gain.

The federal executive branch developed its first formal policy guidelines on conflict of interest and standards of ethical conduct in 1965. These guidelines, set forth in Executive Order 11222, serve as the foundation for the regulations which appear in Part 735 of Title 5 of the Code of Federal Regulations. Generally, they prohibit government employees from soliciting or accepting gifts, loans, or special favors from any party which can be economically, legally, or otherwise substantially affected by either the employee's agency or the employee's official actions.

The law further forbids employees to do anything which would result in, or appear to result in:

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34. State Services Commission, Public Service Manual (Section L) "Conduct of Employees," L 43. See also State Services Act 1962, s. 53 (2)-(3), L. 60-61.

- using public office for private gain;
- giving preferential treatment to any organization or group;
- impeding government efficiency;
- making a government decision outside official channels;
- losing impartiality of action; or
- in any way undermining public confidence in the integrity of government.

Office of Government Ethics lawyers and analysts not only uphold executive branch policies related to conflicts of interest, but also monitor the government's financial disclosure requirements, post-employment regulations, and agency education programs. In addition, the Office issues opinions and advice on certain ethics problems.

In terms of financial disclosure under the Ethics in Government Act, the Office of Government Ethics has responsibility for overseeing two types of financial reports required of the federal executive branch. The first are government employees at the GS-15 level and below involved in contracting, procurement, grants, or subsidies, or whose decisions have an economic impact on any non-federal enterprise and who must file confidential reports of their financial standing. Unless the head of an agency shows good reason to do otherwise, no information from these reports may be released. The second category consisting of top-ranking executive branch officials, including the President and Vice-President of the United States, must file a more comprehensive public report, due every May 15, covering general income, assets, and liabilities during the preceding calendar year. These reports are available to the public within 15 days of filing, either from the agency involved or, in some cases, from the Office of Government Ethics directly.

With regard to post-employment regulation, and the provisions of the Act, the Office of Government Ethics has issued a comprehensive set of post-employment rules which govern the activities of former federal employees. The rules are designed to prevent conflicts of interest in individuals with past ties to government and present ties to the private sector.

Among the post-employment restrictions are:

- a lifetime prohibition against representing anyone on a particular matter which the former employee

"personally and substantially" handled while with the government;

- a two-year prohibition against representing anyone on a particular matter for which the former employee had "official responsibility" while with the government. "Official responsibility" is defined in very specific terms in the Ethics in Government Act;

- prohibitions applying to former Executive Level personnel, military in the grade of O-9 or above, and SES members and government employees classified as GS-17 and above whose former positions involved significant decision-making power or supervisory responsibility, as designated by the Office of Government Ethics. These prohibitions include: (1) a two-year ban on assisting in representing, in person, anyone at a proceeding involving a particular matter which the former employee had handled personally and substantially while with the government, and (2) a one-year ban against oral or written attempts to influence the former employee's agency on behalf of anyone on any matter whatsoever. (However, the Office can rule that certain agency bureaus or divisions carry on separate functions from the rest of the agency. In such cases, former employees may be prohibited from communicating with the bureau for which they once worked, but are free to communicate with other bureaus in the agency.)

The Department of Justice, the Office of Government Ethics, and the agency involved share responsibility for enforcing these post-employment rules.

Ethics education is given great emphasis under the U.S. program. In order to keep federal employees up-to-date about the government's ethics program, each agency has a "designated agency ethics official" who distributes new ethics information, answers questions concerning conflicts of interest, and serves as a liaison with the Office of Government Ethics. Office staff members also visit agencies directly to provide assistance and assess agency compliance with the ethics laws.

Although the Office of Government Ethics renders formal advisory opinions on special matters, it more frequently gives advice on an informal basis. Government agency employees or members of the public with an ethics question involving a

particular agency are first to contact the agency's designated agency ethics official, before dealing with the Office of Government Ethics.

In conclusion, we note that the Ethics in Government Act, when passed by Congress in 1978, contained a five-year "Sunset" provision, with the result that in late 1983 it was necessary for the Act to be re-authorized by Congress, otherwise it would have lapsed and the operations of the Office of Government Ethics would have come to an end. This development could not have been more timely in terms of our review of conflict of interest policy and practice. Two Senate Committees and one House Committee in Congress seized themselves of this Act, and debated at great length the strength and weaknesses which five years of experience had demonstrated in the federal government's efforts to deal with conflict of interest problems. The result of this searching review led to a number of amendments to the Act, which were generally considered to improve weaknesses undetected in the system adopted five years earlier. We have reviewed the Congressional record and reports of these debates, and have benefited greatly from noting points of strength and weakness, drawn to our attention, so topically, by American officials.

(h) Approaches to Conflict of Interest and Standards of Conduct in the Private Sector

1. Professions

We have examined the treatment of conflict of interest by several professions in their respective codes of professional conduct or ethics--being law, medicine, accountancy, and engineering. These four are among the most visible and the longest established, with experience with respect to questions of conflict of interest. This in no way constitutes a complete survey, but serves to present, in general manner, the ways in which professions have dealt with the issue.

Engineering. Professional engineers are governed by provincial associations. We examined the codes of ethics of four of these associations. While not identical, they show a common concern about conflicts of interests which could be encountered by an engineer.

For example, l'Ordre des ingénieurs du Québec states that: "An engineer must safeguard his professional independence at all times and avoid any situation which would put him in a conflict of interest."

Likewise, the codes for professional engineers in Alberta call upon members to avoid conflicts of interest. The codes also require engineers to disclose to clients or employers

any conflicts of interest which do arise. An engineer in these provinces may continue in his relationship with a client in spite of the existence of a conflict of interest, provided that he has made proper disclosure and the client has authorized him to continue.

On a more specific level, the codes comment on certain types of conflict of interest situations which an engineer might encounter. The Code of Ethics of the Association of Professional Engineers of Ontario is perhaps the most extensive in this regard. It states, for example, that engineers should have no interest in supplies or equipment used by an employer. Engineers should also not act in a consulting role on any project for which they are also the contractor, unless this is disclosed.

While the provincial associations of professional engineers govern the conduct of individual engineers within their respective provinces, the Association of Consulting Engineers of Canada has some powers over member engineering firms. For this reason, the Association has developed a "Code of Consulting Engineering Practice". The Association's disciplinary powers are somewhat limited, being restricted to reprimand or ousting of a member firm.

The Association Code contains two rules relating specifically to conflict of interest. The first states that members "shall discharge their professional responsibilities with integrity and complete loyalty to the terms of their assignments." This admonition might be interpreted to require members to avoid conflict of interest situations. The second rule calls for members to disclose any conflict of interest to their clients.

Accountancy. Codes of conduct for Canadian chartered accountants are established by the provincial chapters of the Canadian Institute of Chartered Accountants. The Rules of Canadian Professional Conduct of the Ontario chapter state that one of the characteristics of a profession is that "there is an outlook, in the practice of the calling, which is essentially objective". In addition, "there is acceptance by the practitioners of a responsibility to subordinate personal interests to those of the public good."

Two basic notions of wide-ranging applicability are presented. First, the notion of non-partisanship and objectivity in the performance of one's job; and, secondly, the sense of having a responsibility to the public. Not only are these ideas both relevant to all professions; they would also be applicable to public servants.

The Rules of Professional Conduct go on to deal with conflict of interest more specifically. They state that the

demands of society on its institutions require that chartered accountants be objective and conduct themselves with integrity in the provision of their professional services. It thus becomes a cardinal position of a member of a profession that he will not subordinate his professional judgement to the will of others, and that he express his conclusions honestly and impartially since "the public must be assured of the chartered accountant's freedom from any conflict of interest..."

Since the public must be protected from any conflict of interest involving accountants, a "reasonable man" test is to be applied by the profession to determine whether a practioner's independence or objectivity has been compromised. The Rules state that:

> Any member who is engaged to express an opinion on financial statements shall hold himself free of any influence, interest or relationship, in respect of his clients' affairs, which impairs his professional judgement or objectivity or which, in the view of a reasonable observer, has that effect.

Individual accounting firms may also have their own office code which deals with professional conduct and conflict of interest. For example, a major firm's "Notes for Professional Staff" state that partners and staff must adhere "to the rules of professional conduct established by ... provincial institutes or order of chartered accountants and of management consultants".

This office code goes on to state specific rules for certain types of situations. For example, partners must not accept gifts from a client. Likewise, they may not invest in shares or securities of client companies. It is also noteworthy that the firm requires that audit staff members have a responsibility to notify their manager or partner if they are assigned to an audit where they have been employed, have a relative employed, or have a relative employed by a competitor of our client. This requirement exhibits a general parallel with government post-employment activity guidelines.

Medicine. Doctors in Canada are licensed on a provincial basis. However, the only code of conduct for medical practitioners is the Code of Ethics promulgated by the Canadian Medical Association (CMA).

The CMA's Code of Ethics does not deal specifically with the issue of conflict of interest. However, several of the items in the Code deal with specific types of situations which might be viewed as presenting a potential conflict of interest. For

example, the Code states that a physician, prior to examining a patient on behalf of a third party, should communicate to the patient his legal responsibility to the third party.

With regard to financial arrangements, physicians are required to avoid "any personal profit motive" in regard to the ordering of drugs, diagnostic procedures, etc. As an example, this clearly would prohibit a doctor from owning a radiology clinic to which he might send patients. At the same time, physicians are obliged to refuse any sort of payment for services from persons other than the patient. In addition the Code of Ethics states that an ethical physician, when a witness, will recognize his responsibility to assist the court in arriving at a just decision.

The effectiveness of this Code may be called into question by some. There may be cases where some physicians prescribe unnecessary treatment or where some doctors receive free samples of medication from time to time from pharmaceutical companies. On the subject of medical professionals appearing as witnesses, the concern for serving the ends of justice would not appear to be as clear in practice as it is in the Code. For example, psychiatrists in criminal cases tend to be identified as either prosecution or defense witnesses. There are apparently some undesirable practices which the Code of Ethics has not completely eradicated.

Law. Canadian lawyers are licensed and governed by the provincial bar associations. All of these associations have their own codes of professional conduct. In addition, the Canadian Bar Association (CBA) has published such a code.

The CBA's Code of Professional Conduct provides perhaps the most extensive treatment of professional ethics and conflict of interest of any professional association. The general rule put forth is that lawyers:

> must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client ... should not act or continue to act in a matter where there is or there is likely to be a conflicting interest.

A conflicting interest is defined as one "which would be likely to affect adversely the judgment of the lawyer .. or his loyalty to a client ... or which the lawyer might be prompted to prefer to the interests of the client ... ."

The Code goes on to provide commentary illustrating the types of situations which might occur. Conflicts of interest are not restricted to the financial affairs of lawyers. The responsibility to disclose conflicts of interest to a client is also considered. In some cases, a client may, quite properly, wish to retain a lawyer in spite of a conflicting interest. Other cases may require the lawyer to withdraw altogether. The Code leaves considerable room for professional discretion based on the particulars of the specific case.

Individual law firms have published their own policies to supplement the codes of their bar associations. For example, a major Canadian firm has set out specific guidelines with regard to such issues as borrowing from clients, trading in the public securities of clients, and investing in clients or their businesses other than through publicly traded securities.

It would appear that the legal profession has the most extensive set of ethical guidelines, based on high principles of honesty and integrity, of any professional group. However, this has not prevented the legal profession from being the subject of public mistrust or suspicion. Despite the well-intentioned and high-principled codes, there has existed, in varying degrees, a lay perception that lawyers do not always act in a principled manner and are not always trustworthy.

A graphic example occurred during the "Watergate" crisis. It was noted that a large number of the conspirators were members of the legal profession. When the Chief Legal Officer of the United States, Attorney General John Mitchell was indicted and convicted of criminal offenses, the reputation of the profession was brought into question. Although many of the guilty lawyers were disbarred, the fact remains that high-sounding codes of ethics and conduct did not prevent offenses being committed. The argument may be advanced that lawyers are no more moral and upright than other members of society and that their personal foibles and greed may enter into their professional behaviour.

Such an attitude may be partly a response to the nature of large, traditional, self-regulating professions. Lawyers, doctors, accountants, engineers, etc., all deal in complex fields of specialization which are something of a mystery to many lay people. The fact that these professions are self-regulating furthers the feeling that they constitute a monopoly control of specific knowledge. Clearly, a counter-argument can be advanced. However, professional codes of conduct and redress mechanisms are not, in and of themselves, sufficient to guarantee public trust and public well-being.

The reasons for this could be twofold. First, codes of professional conduct could be incomplete as regards conflict of

interest. However, our examination of various professional codes indicates a widespread, consistent, and reasonably deep concern with the necessity to avoid such situations. By and large, professional codes of conduct exhibit an appropriate and satisfactory degree of concern with this issue. The second possible reason for the occasional failure to protect the public concerns the willingness of professional associations to apply them and to police the membership. Given that professional associations are self-regulatory, and that codes call for a high degree of respect and even collegiality between members, it is not surprising that enforcement of codes of conduct could be somewhat lax in certain situations. The primary objective of professionals is to carry on a practice, not to administer others doing the same thing. Finally the very notion of professional judgment implies a trust in the honour and integrity of individual practitioners to conduct themselves appropriately.

We therefore conclude that cases where the public has not been adequately protected from abuses of privilege probably arise out of innate characteristics of the self-regulating professions - their homogeneity, their cliquishness, and their elite position of control of crucial technical knowledge. These characteristics have made it difficult (and somewhat understandably so) for these groups to adequately apply force to their codes of conduct in all cases. That being said, it must be added that the record of conduct of the vast majority of professionals has been above reproach.

Professional codes seem to be fairly comprehensive vis-à-vis conflict of interest. They tend to state rules fairly generally, but this is, in our view, an appropriate stance. Any difficulties that have arisen with regard to enforcement seem to be the result of a lack of inclination or due to administrative machinery rather than as a result of deficiencies of the codes.

Some of the deterrents to professionals acting to discipline one of their own do not exist in the public service. The government is not a homogeneous body of independent practitioners. There is not the same collegial attitude as in the major professions. Moreover, public servants are all employees of the Crown. This is quite distinct from the situation of partners in an independent professional concern. These individuals are self-employed, thus adding to their independence. Nonetheless, the public service will have to ensure the enforceability of any new code it adopts. If reliance is placed on individual managers (under the responsibility of deputy ministers and heads of agencies) to enforce such a code, there may be problems of variability in treatment as well as concern. Quite simply, some managers may not consider the issue of conflict of interest to be that important.

2. Business Corporations

There is a general perception that conflict of interest concerns and business morality generally are more lax in the private sector. This may also be accepted to some extent because private business is just that - private - and does not entail the public trust that work in government does. Thus, it is not surprising that some of the companies which we contacted in our examination of private sector practices did not have any codes of conduct or conflict of interest policies. At the same time, we did receive copies of quite a few codes of business ethics. These codes tend to come from fairly large corporations which would be likely to have the manpower and expertise to develop them.

Contrary to the notion that "anything goes" in private business, large corporations, with publicly traded securities and large numbers of employees, do have a need for guidelines on professional conduct. Employees of such organizations are viewed as having responsibilities and duties of trust to shareholders and the organization as a whole. They owe their first business allegiance to the company, and therefore they must remain free of interests or relationships which are harmful or detrimental to the company's best interests. Employees should avoid not only a real conflict of interest, but also the appearance of one which could tarnish their own or the company's image.

Most of the corporate codes which we have examined deal with the same types of issues. For example, a common concern is that employees should not have an interest in supplying goods or services to the company. Likewise, private companies obviously do not want employees to hold an interest in a competitor. Another common concern involves payments to government officials or customers. Generally, nothing of value (including cash payments, gifts, favors or entertainment) may be given, paid, promised or offered, directly or indirectly, to any government officials, customers or prospective customers for the purpose of securing a preferential governmental or customer action.

At least two companies have codes that deal with political contributions. Federal election campaign laws in the United States prevent corporate political contributions. Individual employees have the right to make personal contributions but employees operating in jurisdictions within or without the United States where corporate political contributions are illegal may make personal political contributions to candidates and organizations of their choice. Of course, no employee should make a personal political contribution with a view to assisting the company in obtaining or retaining a business.

Corporate codes do not generally go into extensive detail on conflict of interest, being aware that one cannot possibly identify all specific types of situations that might arise. However, these codes do state the basic principles in a clear and forthright manner; principles which are consistent with those that the government has adopted and which we view as proper.

3. Business Codes of Ethics

In the course of our meetings, we have heard well-informed and senior government officials express the view with considerable conviction that standards of conduct in the public sector must be set higher than in the private sector, the inference being that in the business community, for example, "anything goes".

Generalizations are unreliable because they fail to take into account the great variety of conditions which actually exist, and certainly we have seen cases with private sector companies of highly developed codes of ethical conduct and strict adherence to them. Several dozen corporations which provided us with copies of their codes of conduct and conflict of interest policy statements are shining examples of what is possible.

One major resource corporation emphasized that it views the conflict of interest question, along with strict compliance with combines laws, as part of the whole subject of ethical behaviour in the corporation. It takes pride in its tradition of high principles and takes pains to maintain the highest standards of business practice. The company's corporate reputation rests upon the ethical behaviour of each individual who works for it; consequently great importance is placed on the appropriate and regular communication of these goals to employees. This program is reviewed annually by an internal committee responsible for evaluating the effectiveness of communication with employees in this regard.

This particular company, to continue with the same example which is typical of many Canadian corporations, communicates its views on ethical behaviour to all employees through a publication Corporate Ethics: A Statement of Role and Principles. This publication is distributed to employees upon joining the company, and at appropriate intervals during their careers. The publication is accompanied by a letter from the Chief Executive Officer, thereby indicating the priority attaching to matters of ethical conduct in the company.

There is, of course, a special group of employees who, by virtue of their role in managing the company, or through their exposure to confidential information in the course of their employment, are exposed more explicitly to potential situations where conflicts of interest might arise. As part of this corporation's audit and review procedure, these employees are asked to sign an annual statement confirming compliance with the company's policies on business ethics, conflict of interest, and related matters.

The strength of this approach appears to be that, first, the company endeavours to make its code of behaviour as explicit as possible to employees, and second, the company provides a mechanism for counselling and review with company officials in areas which employees may feel to be unclear or ambiguous. There is no question that the responsibility for disclosure rests with the employee.

In reviewing the program and procedures of various corporations such as this, we conclude that in a number of instances, Crown corporations and a number of departments of the federal government could learn from the private sector. This is true particularly with respect to reformulating the rules to make them clear, having supplemental codes, putting explicit guidance in particular cases, providing a greater emphasis on seeking advice and guidance with respect to conflict problems when they arise, and heightening the educational role and general awareness with respect to the conflict of interest rules.

CHAPTER 11

PARTICULAR ISSUES AND CONSIDERATIONS

Before proceeding with the main recommendations, it is appropriate to examine the impact of conflict of interest rules on specific groups and categories of public officials and on a number of particular issues, namely (a) privacy and confidentiality, (b) short-term agencies, (c) the investment of money and the ownership of property by those in government, (d) involvement in "outside employment" by those in government service, (e) the nature of "lobbying in the Canadian political system", (f) the application of rules to spouses and other family members, (g) confidential information and compellability to testify, (h) sanctions and penalties, and (i) the relationship between the public and private sectors.

(a) Privacy and Confidentiality

The passing into law of the Privacy Act and the Access to Information Act did not affect the procedures associated with the handling of files and documents relating to the administration of the conflict of interest guidelines.

Personal and confidential files pertaining to Governor-in-Council appointees, ministers of the Crown, and their exempt staffs are still not accessible to the general public under any circumstances and are treated like papers bearing a confidential security classification. The only documents made available to the general public, on request, are those placed in the Public Registry in the Office of the Assistant Deputy Registrar General.

(b) Short-term Agencies

Short-term agencies such as royal commissions and task forces are set up by the government for a myriad of reasons and are a highly useful and economic means for dealing with particular subjects in an expeditious manner. Such agencies are introduced by various means including existing legislation, the prerogative of the Prime Minister and the Inquiries Act. The type of agency created and its purpose will, to a great degree, determine its personnel requirements. The question arises as to the

appropriateness of subjecting this personnel to a conflict of interest régime.

In many cases, individuals are appointed to short-term agencies from outside the public service. At the end of their assignment, they normally return to private life. The application of post-employment guidelines, which include a cooling-off period, in these cases would make it difficult for the government to recruit qualified people. Moreover, it would not be reasonable, in all cases, to require them to renounce current interests and directorships for a very short period of time.

The type of work to be performed by the agency must be considered carefully as well. If individuals from the fishing industry are appointed to conduct an investigation into certain fishing practices, there could be potential for conflict and they could properly be asked to divest themselves temporarily through trust management of their holdings in that industry. On the other hand, if a group is convened to study the effects of moving an embassy from one city of a foreign country to another, the possibility for conflict is remote, probably non-existent.

In summary, no rule of general application can be established. The advice of the Ethics Counsellor should be sought in each case where the extent of the conflict of interest is unclear.

(c) The Investment of Money and the Ownership of Property by Public Office Holders

1. The Investment of Money

The present guidelines require that ministers and Governor-in-Council appointees place in trust, or otherwise divest themselves through sale of all shares in companies which are traded on public exchanges and all other non-exempt or controlled assets. Public servants are also required to so divest where such holdings do or could conflict with their official duties.

Under the current guidelines most mutual funds are considered to be exempt property if they are held for retirement income purposes. Also, the ministerial guidelines consider all mutual funds as exempt assets. Individuals with such holdings are considered to have the equivalent of a blind trust as the very nature of a mutual fund is such that it is managed by another individual having no consultation with the owner.

The Tradex Investment Fund Limited is one such incorporated mutual fund which invests in corporate stocks and bonds, and which sells its shares on a continuous basis. The

management of the Fund's assets is entrusted to an investment counselling firm. Only public office holders or their families can be shareholders of Tradex.

In recent years, the majority of directors have come from the Department of Industry, Trade and Commerce and Statistics Canada. Some officers of these departments have access to confidential information about the assets and performance of corporations that is not available to the public. The Fund's directors and managers have taken a number of steps to avoid possible accusations of senior public servants using insider information to guide Tradex investment decisions. The following statement has appeared in the Tradex Fund Prospectus for the past five years.

> Under an agreement effective the 5th day of June, 1969 the Fund retained Sceptre Investment Counsel Limited (hereinafter referred to as Investment Counsel), ... to act as Investment Counsel to manage the investment portfolio of the Fund. The Investment Counsel selects, purchases, sells and maintains a continuous supervision of the securities in the Fund's portfolio. The agreement, in accordance with the restriction in the letters patent of the Fund, provides that the Investment Counsel will not solicit, receive or act upon any advice or information which may directly or indirectly come to it from any director or shareholder of the Fund. The purpose of that provision is to prevent a director or shareholder from affecting or influencing the selection or disposition of the securities of the Fund. The Board of Directors, through its Investment Counsel Liaison Committee, regularly evaluates the performance of Investment Counsel but as stipulated in the letters patent no recommendations are made to the Investment Counsel on the sale or purchase of any individual security. (Emphasis added).

We are informed that Tradex is regarded in relation to conflict of interest purposes in exactly the same light as other diversified mutual funds.

The Office of the Assistant Deputy Registrar General, in the performance of its duties, comes into co act with many new and different investment schemes. It has prepared a number of internal memoranda to familiarize staff members with the multitude of sophisticated investment vehicles now available to Canadians. These memoranda outline certain considerations and procedures in evaluating how these types of investments may or may not be compatible with the conflict of interest guidelines.

2. The Ownership of Real Estate

In general, public office holders are subject to the same rules with respect to the treatment of real estate property holdings where conflict of interest may arise, as other people. There are, however, some special rules and some special problems which relate specifically to them.

Certain Governor-in-Council appointees are required to be farmers in order to qualify for their appointment. Their farms are publicly disclosed and there is an exchange of letters between the individual, the minister responsible and the Assistant Deputy Registrar General to take this into account, the understanding being that the law takes precedence over the conflict of interest guidelines.

If a farm is purchased by an official who knows that the government is intending to purchase the land at some point in time, that person could be held to have used official information to further his or her personal gain.

There are a number of specific instances in which the ownership of property must be carefully assessed. Transactions between the government and the public office holder for the purchase and sale of real estate raise potential issues described by O.P. Dwivedi as follows:

> Civil servants, like other citizens, can acquire or dispose of any immovable property by lease, mortgage, purchase, sale, gift, or otherwise, and no previous sanction of the government is necessary. But no purchase can be made from, and no sale to, any civil servant without the express sanction of the Treasury in the case of government property. Moreoever, it has been a custom not to permit civil servants to take part in the auction of government property if they are related to the department which is sponsoring the auction. Except for this informal

> restriction, there is no other restriction on the purchase or sale of property by civil servants. Because of the absence of any restriction, there may be a possibility of corruption among some senior civil servants. There have been a few cases where civil servants managed to purchase costly land for a nominal price because they obliged the other party in some way by using their official status. To avoid this temptation among civil servants, it is necessary to impose some restrictions on their purchase or sale of property. They should be required to obtain permission from their deputy minister before buying or selling any piece of land.[1]

Problems also arise when a person is acting as a trustee for an estate where the holdings are intended to be expropriated by his or her office.

Finally, the acquisition of public assets can raise potential conflicts for officials with relevant confidential information who are in a position "to acquire or rent surplus public assets through means which are not equally available to the general public." Illustrations of this type of problem include:

1. acquiring surplus Crown assets, unclaimed or confiscated private goods, or commercial-type by-products of government programs, before they have been offered for sale to the public, or while the official's office is involved in their disposal;

2. acquiring a lease for Crown property whose public availability has received only limited publicity.[2]

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1 O.P. Dwivedi, "A Code of Conduct for Civil Servants", The Dalhousie Review, 44, No. 4, (1964-65), pp. 454-455.

2 Report of the Interdepartmental Committee on Conflicts of Interest (Jean Boucher, Chairman), 1972, p. 2.

(d) Engagement in Outside Employment by those in Government Service

As noted in Chapter 7, the problem of holding down two or more jobs simultaneously was one of the first dealt with by Order-in-Council as the Government of Canada began to create written rules to govern conflict of interest problems arising in the public service. The Ministers' Guidelines and the Governor-in-Council Guidelines are quite specific on this subject. They state that the individuals to whom they apply may not, while holding office, engage in the practice of a profession or in the management or operation of a business or commercial activity. Nor may they retain or accept directorships in any commercial corporation.

In general, public servants are not prohibited under the present guidelines from engaging in outside employment where it is not specifically prohibited or where it does not conflict with their official duties. Yet this provision is obviously open to ambiguous interpretation, and quite properly might be extended quite far. For instance, even if a second job which a public servant held during the night-shift did not in any way conflict with the nature or type of position held with the government during the day, an employee who works all night and catches up on sleep in the office during the day, and therefore is unable to deliver a full day's work for a full day's pay, is involved in a conflict of interest.

A conflict of interest situation may develop, or appear to develop, when an employee's actions enhance the financial interests of his part-time employer. Other conflicting situations which may be included under this category are those where supplementary employment or self-employment reduces to an unacceptable level the interest or energy an employee devotes to his or her government job; where outside employment may require an employee to use government services and property (such as telephone services and stationery); and where outside employment is performed in such a way as to give the impression of an official act or to appear to represent an official (governmental) point of view.[3]

Yet in some situations, certain types of remunerated outside engagements can be in the interest of the public service as well as in the professional interest of the public office

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3. Kenneth Kernaghan, Ethical Conduct: Guidelines for Government Employees, op. cit., p.14.

holder concerned. As noted in the Report of the Interdepartmental Committee on Conflict of Interest (1972) (p.3) a number of public officials are invited to lecture, particularly at the universities in the National Capital, on matters that are non-confidential and do not relate to current government policies. Their teaching is often not only relevant to their functions in the public service, but it provides an opportunity to keep abreast of the advance of knowledge.

Of some concern is the recent proposal for shared work, under which the functions or services of many federal public servants would be fulfilled by two people, rather than one, dividing their time. Its implication for conflict of interest is clear enough. Shared work means mid-level public servants working two or three days a week, or five half-days a week, and thereby having a significant amount of free time. Given the interest, motivation and knowledge of these individuals, it is predictable that, before too long, some would seek additional outside employment, perhaps through consulting companies in which they were the principal. It is reasonable to expect that this outside work would be akin to that which they are, at other times, providing for the government. Such a development, would, in essence, make the "post-employment" problem a matter of daily and widespread concern.

The current restriction on outside employment relates to the employee's possible unauthorized use of information obtained in the course of public service employment, and to actual or potential conflicts of interest resulting from outside employment activities. While some departments have restrictions on outside employment expressed in their supplemental codes of conduct, others have reported difficulties in formulating clear guidelines on these matters. The objective of such guidelines is to be fair both to the individual and the employer, while at the same time encouraging research, participation in professional associations and intellectual interchange with the community.

For public servants, there is no existing requirement for deputy head authorization for outside employment (except where such employment is to be with another part of the government) and the introduction of such a requirement would likely provoke considerable negative reaction from public servants. However, the point might well be highlighted in supplemental codes, which could at least specifically mention the problem of outside employment, and recommend and encourage employees to seek deputy head clearance. Where such approval is obtained, it could help eliminate any suggestion of improper conduct which might be raised subsequently.

The issue of public office holders engaging in outside employment is not always a clear-cut question between public and

private interests. To illustrate, in many instances, the public service is pre-eminent in Canada, if it does not have a virtual monopoly, in having staff who possess certain skills and knowledge. Because of this, it would seem in the public interest that public servants be able to make their skills and knowledge available to the private sector during their off-duty hours. This is particularly the case with some of the staff of Environment Canada, a department in which there is a high concentration of technical and scientific ability.

The Department of the Environment has a mandate to promote and develop many scientific capabilities and to enhance public awareness and appreciation of these within its sphere of activities. It seeks to achieve this, in part, by encouraging private sector capability through such means as grants, agreements and contracts with the private sector; by making available consultative services; by ranking available information and through publicity and educational programs. There are, however, monetary and personnel constraints upon the department's capacity to achieve these objectives, and it is felt that some of the goals that it seeks to attain could be advanced if employees were permitted to employ their skills in the private sector during their off-hours.

The conflict of interest guidelines presently in place appear to be such that the department is severely restricted in some instances in granting any authorization for off duty work of the same nature as the public servant is engaged in while working for the government. Not only must public servants' conduct be above blame and free of any wrongdoing in fact, the acceptance of outside employment by a public servant must not be permitted to give rise to question in this regard. Consider for example this injunction: "It is by no means sufficient for a person in a position of responsibility in the public service to act within the law. There is an obligation not simply to obey the law but to act in a manner so scrupulous that it will bear the closest public scrutiny....", and phrases like "appear to exist," "appear to benefit," "conceivably be construed" and "call into question". Because of the stringency with which the guidelines are drafted and their broad scope, it is virtually impossible for some employees not to encounter a conflict of interest situation if they take outside work of the same type they are engaged in for the department, no matter how scrupulous and open they are and despite the fact that in the departments's view, such outside activity would benefit Canadians.

The department employs meteorologists (weather forecasters). In Halifax, one of these sought to work part-time for a private, Canadian firm that provides site-specific weather forecasts to oil drilling companies. Private meteorological forecasting is a fledgling industry on the Atlantic coast,

although such services are available from competing American firms. The Canadian firm's competitive existence depends upon its ability to employ government meteorologists on a part-time basis to supplement its full-time staff. The department has been advised that should the employee in question take up such outside employment, he would be in a conflict of interest situation. Since the proposed employer uses weather forecasting services made available by Atmospheric Environment Services, it is conceivable that it might get preferential treatment were it to call the weather office and be dealt with by the employee fulfilling government duties. This would place the employee under an obligation to persons who might benefit from special consideration or favour or who might seek to gain special treatment, which is contrary to the conflict of interest guidelines. The employee's capacity to perform his duties in an objective manner could be called into question. It is also possible that were he or she to call the weather office to get information while working for the company he or she might get preferential treatment from fellow employees, or at least this could appear to be the case.

During the course of his or her government duties, the meteorologist gains information which he or she uses to predict the weather. On leaving the government shift and going to work for the company, he or she takes the information and uses it in preparing weather forecasts for the company. The department does not feel that there is anything wrong with this, yet the guidelines require that a public servant not benefit, or appear to benefit, from the use of information acquired during the course of his official duties, which information is not generally available to the public.

In many Canadian cities, Atmospheric Environment Service provides weather broadcasts free of charge to radio stations. There is no guarantee that a radio will get any particular meteorologist when it calls in. However, some radio stations would like to have a personality and a voice giving the weather forecast identified with the station. Some have a preference for particular meteorologists because of their voice or manner of presentation. In order to assure themselves of the services of these meteorologists, radio stations have sought to employ some of them to give radio weather broadcasts outside their working hours.

The department favours such outside employment for several reasons. It is responsible for the diffusion of weather information to the public and needs and welcomes the broadcast of weather information by the privately owned media. It considers that the science of meteorology is better served and that its perception by the public is enhanced if trained meteorologists give weather broadcasts rather than announcers. For monetary, as well as staff relations reasons, the department does not feel it can, or should, guarantee that radio stations have a weather

forecast broadcaster identifiable with a particular radio station. In general, the department doesn't object to such off-duty work by its meteorologists since they promote department goals and the science of meteorology. However, there is concern that employees taking up such work may be in conflict with the guidelines.

The meteorologists in question are undoubtedly attractive to their prospective employers because they are employed by Atmospheric Environmental Service. In order to prepare for their morning broadcasts, they consult with the meteorologists on duty at the government weather office. (Weather offices operate 24 hours a day). It is possible, particularly if the off-duty meteorologist who is doing the weather broadcast for gain is a supervisor, that preferential treatment may be given by a co-worker who is on duty at the weather office, or this could appear to be the case. It can be seen that an apparent contravention of the guidelines does not necessarily indicate wrongdoing or a breach of the public interest. In fact, the opposite could be true.

(e) The Nature of Lobbying in the Canadian Political System

Elsewhere in this report, in discussing ambiguous wording in the present guidelines, we ask "what is lobbying?" because the post-employment guidelines for ministers stipulate that they should not, within two years of leaving office, "lobby" for or on behalf of a person or commercial corporation before any department or agency for which they were responsible on an ongoing basis during their last two years in the ministry.

The question of lobbying is a difficult one, because there is no precise and commonly accepted meaning of the word. Lobbying started with the English House of Commons where, in a large ante-room known as the lobby, persons with special interests could meet with the legislators before they entered the House, in an effort to convince them of the need to support a particular cause, or to see an issue from a particular perspective. During the 1800s in the United States lobbying and lobbyists earned a reputation from which their descendents today have yet to clear themselves completely. While there is recognition that lobbying can be a constructive force (providing information, contacts, alternate perspectives), there is concern that it may reflect ulterior motives. It now is more respectable, and in the United States lobbyists operate openly as registered advocates for employers by appearing before legislative committees and regulatory agencies, often supplying useful information on complex issues.

Activity by former ministers in the realm of providing information to government to bring about certain public policy

objectives could be seen as a recommendation rather than an attempt at lobbying. However, seeking special privileges or preferential treatment is not permissable. There is a distinction to be made, too, on the basis of whether one engages in such activity for pay.

Section 110 (1) (a) of the Criminal Code prohibits an "official" from directly or indirectly agreeing to accept any form of benefit to assist, cooperate, exercise influence or for an act or omission in connection with any matter of business relating to the government or a claim against the government or any benefit it is entitled to bestow. This offence is aimed at persons with official positions who offer to use their office to influence government business decisions, whether or not in fact they are able to do so, and is often referred to as influence-peddling. It is relevant in trying to determine the outer bounds of permissible lobbying activity.

Also, s. 108 of the Criminal Code prohibits a member of Parliament from corruptly accepting, or agreeing to accept, "any money, valuable consideration, office, place or employment for himself or another person in respect of anything done or omitted or to be done or omitted by him in his offical capacity."

The Senate and House of Commons Act, in section 23 (1) prohibits a member from receiving compensation for services rendered in relation to any matter before Parliament, or to influence him. Further, a member is prohibited by Standing Order Number 14 of the House of Commons, from voting on any matter in which he or she has a direct pecuniary interest, and the vote of any member so interested will be disallowed.

Beauchesne's Parliamentary Rules and Forms proscribes the acceptance of fees by members for professional services connected with any proceedings or measures of Parliament, and indicates that it is not consistent with parliamentary or professional usage for a member to advise as a paid counsel upon any private bill before Parliament.

The traditional discussion of lobbying has centered on the relationship which groups and interests have with legislators. It appears that usage of the term "lobbying" in this sense in Canada has an extended definition, to include representations and interventions made to the public servants handling a particular matter. In these instances, there may be no piece of legislation currently before Parliament which is relevant, and the lobbyist simply is seeking favourable interpretation of existing provisions, a change in regulations, or special consideration under existing programs and services.

The American experience in registering lobbyists and the increasing pressures in the United Kingdom for new rules in this area have been noted. The subject was discussed in Canada in the 1973 Green Paper entitled Members of Parliament and Conflict of Interest. We conclude only that there is uncertainty as to the commonly used meaning of the word "lobby", and therefore recommend that it not be used in any rules governing ethical conduct at the federal level in Canada. Alternate words, clear meaning and more precise application, should be chosen in cases where the perceived problem is to be addressed. The word is not used in any of the reformulated rules recommended in this report.

(f) Application of Rules to Spouses and Other Family Members

In the course of our hearings and in discussion, the issue arose as to the application of conflict of interest rules, particularly those requiring Cabinet ministers to divest themselves of assets, to the minister's spouse and other family members as well. To some, it seemed reasonable and in the public interest; to others, it seemed grossly unfair.

Essentially, two separate schools of thought are in conflict. One is the movement for greater openness and ethical conduct in government, with strict conflict of interest laws.

The other is the "Feminist Movement", or "Women's Liberation", view emphasizing independent careers of women in the workplace. While the reference to "spouse" in the conflict of interest guidelines applies to either a man or woman, most Cabinet ministers have been men, and until recently most of their wives did not have separate business careers, although some had investment portfolios. In contemporary society, a Cabinet minister, whether male or female, is more likely to have a spouse with an independent career.

The 1979 guidelines applicable to ministers initiated by Prime Minister Clark, included restrictions for spouses and dependent children, a fact which gave rise to contentious application of the rules when the wife of at least one Cabinet minister initially refused to have her independent and separate financial holdings governed by these guidelines which after personal intervention by the Prime Minister she chose to follow. The 1980 guidelines for ministers reverted to the earlier position. The leader of the New Democratic Party has submitted this view to us:

> The 1980 guidelines expressly exempt spouses and dependent children from their purview. This reflects a view that each spouse may wish to pursue her or his own career. Because their

> careers are "independent", the financial details of only one are now required to be disclosed. This is wrongheaded. Despite separate careers, marriage remains in part an economic union, a partnership of equals. As has been recognized to varying degrees in family law reform legislation, each spouse may have a pecuniary interest in the economic activities of the other during (and after) a marriage. The conflict of interest provisions should not ignore this interest.

A former Cabinet minister suggested that individuals who become Cabinet ministers become "public property", having knowingly launched themselves on this course, and must expect as part of the régime, application of conflict of interest rules not only to themselves but to their spouse and immediate family as well.

In our review of the provincial and territorial provisions in this area we note that except in Manitoba, Nova Scotia and Prince Edward Island the conflict of interest rules apply to family members. In those provinces where the guidelines extend to the family, there is variety in the nature and extent of this further application. For example, in Ontario and Quebec the rules apply to the spouse and minors; in New Brunswick to the spouse and dependent children; and in Newfoundland to the spouse and those within one degree of relationship by marriage. In Saskatchewan they apply to the spouse and dependent children but only if they act on behalf of the member of the Legislative Assembly, while in Alberta rules apply to the spouse (unless legally separated) and to minor children. In the Yukon, the rules apply to the spouse and dependents residing with a minister, while in the Northwest Territories, they apply to a dependent spouse, son, daughter or other relative living in the same house.

Our view is that the rules as stated in the current guidelines applicable to ministers represent a fair balance or compromise between the competing interests in this area. These 1980 guidelines do not apply directly to spouses or dependent children of ministers. The rule then adds:

> It goes without saying that ministers must not transfer their assets to their spouses or dependent children with a view to avoiding the requirements of these guidelines. Ministers should also bear in mind their individual responsibility to prevent conflicts of interest, including those that might

> conceivably arise or appear to arise out of dealings in property or investments which are owned or managed in whole or in part, by their spouses or dependent children.

The wording of this current provision might be clarified, and should be included in the procedural rules used to minimize conflict of interest situations.

Departments have reported some difficulty in dealing with holdings of family members which may create conflicts of interest for employees. While such holdings do not have to be declared, there may be occasions where employees consider that they place them in an actual or potential conflict in relation to their position and duties. In line with the spirit of the guidelines, employees are encouraged to act "in a manner so scrupulous that it will bear the closest public scrutiny", and use the declaration process to indicate good faith.

In administering the conflict of interest guidelines for the public service, care must be taken to ensure that the rights of spouses and other family members are respected. Nevertheless all employees should be aware of the need to examine carefully and, if necessary, disclose spousal assets and businesses (existing or new) which could be seen as conflicting with the partner's employee's official duties. Transfers of assets to a spouse or to members of an employee's immediate family must not be made to avoid the requirements of the conflict of interest guidelines. It is recommended that clarification of declaratory responsibility relating to spousal and other family members' assets and activities be incorporated in all departmental codes of conduct.

(g) Confidential Information and Compellability to Testify

In the course of its investigations, the Task Force examined the area of the use of information acquired through government channels for other than official purposes and its observations follow.

1. Compellability to Testify

A submission was presented by several employees of the Aviation Safety Bureau of Transport Canada expressing concern that when such employees are subpoenaed as expert witnesses, their testimony in court could be in direct conflict with their duties because: 1) they could appear to be in danger of prejudicing the necessary impartial judgement and objectivity required to perform their regular duties; and 2) they may be called upon to testify on the basis of their own conclusions, which could cause conflict

over the release of privileged or classified information acquired with the assurance it would be used for safety only.

Although the mandates of the department and of the courts are not the same, the difference does not necessarily imply a conflict of interest between the two. The Department of Transport has the responsibility to investigate accidents for the purpose of improving public safety. Although its purpose is not to lay blame for accidents, it is only natural and right that evidence gathered from detailed investigations should be used in the determination of blame. At the same time, it is the primary purpose of the courts to serve the ends of justice. It is towards those ends that civil courts, as a secondary purpose, make findings of blame and award damages. The Crown also has a responsibility to support the ends of justice, the law, and the courts. Therefore, employees of the Crown would appear to have a responsibility, in that capacity, to assist the courts in achieving a just resolution of a case whenever possible. It may be argued that, as a fundamental principle of law, the government should make available all appropriate resources (including its expertise) to assist the courts in rendering just decisions.

The Canadian Aviation Safety Board Act (Bill C-163, passed by the House of Commons on October 24, 1983) addresses specifically the use of information obtained in the course of an investigation. Section 23 reads as follows.

> 23.(1) On completion of any investigation by the Board of an aviation occurrence, the Board shall prepare and, subject to any restrictions in the interest of national security referred to in sub-section 13(3) and to subsection 13(4), shall make available to the public a report on its findings and wherever possible shall, in the interests of aviation safety, include in its report recommendations based on its findings.

Sections 29 (3) and 29 (4) state:

> (3) Regulations made under subsection (1) shall include rules for the protection of the identity of persons who report aviation occurrences under a voluntary reporting system and may include such rules in respect of a mandatory reporting system.
>
> (4) Notwithstanding any other Act or law, no person shall be required, in connection with any legal, disciplinary or other proceedings, to give evidence that could reasonably be

> expected to reveal the identity of a person who has made a report to the Board pursuant to regulations made under subsection (1) where that identity is protected by rules referred to in subsection (3).

In a parallel situation, medical doctors often present expert testimony in civil actions. It is not the purpose of the medical profession to assist (or prevent) plaintiffs in claiming compensation. Nevertheless, the medical profession has recognized that its expertise is often essential for the just disposition of civil cases. It should be noted that the Canadian Medical Association's Code of Ethics states that physicians, when witnesses, have a responsibility to "assist the court in arriving at a just decision." The emphasis is on serving the needs of justice, not necessarily the pecuniary interests of clients.

While the Task Force is not convinced that the problem is one of conflict of interest, there may be an issue concerning the use of confidential information for such a purpose.

2. Use of Confidential Information

The Access to Information Act protects certain types of information from being revealed to the general public. There are specifically 54 statutes which contain such restrictive provisions. An example is Section 114 of the Unemployment Insurance Act (also discussed in Chapter 8) which reads:

> Information, written or oral, obtained by the Commission or the Department of Employment and Immigration from any person under this Act or any regulation thereunder shall be made available only to the employees of the Commission or the said Department in the course of their employment and such other persons as the Minister deems advisable, and neither the Commission, the said Department, nor any of their employees is compellable to answer any question concerning such information, or to produce any records or other documents containing such information as evidence in any proceedings not directly concerned with the enforcement or interpretation of this Act or the regulations.
> (1976-77, c. 54, s. 60.1)

3. Oaths of Secrecy vs. Compelled Testimony on Subpoena

The question has been raised as to whether or not the oath of secrecy an individual took at the time of his or her appointment to office is sufficient to permit that individual to be therefore not required to testify in court.

The question of whether an oath is legally binding on the person who has sworn it, or is binding in moral terms only, is of interest. It has been considered primarily in the context of whether the Oath of Secrecy which public office holders swear or affirm can be relied on sufficiently (and enforced through means of a restraining injunction where necessary) to safeguard confidential information in the post-employment period.

The issue received an extensive airing in England, in the Crossman Diaries Case in which the then Lord Chief Justice discussed a Privy Councillor's oath in the context of a former Cabinet minister publishing diaries disclosing confidential information acquired as a Cabinet minister, and considered whether there was power in the Court to restrain publication[4]. For a variety of reasons, the Court refused to grant an injunction restraining publication.

The attempt was made in the case to argue that the oath sworn by Mr. Crossman as a Cabinet minister would have been breached in the event of publication, although it was "not seriously relied on". Instead, said the Lord Chief Justice, "the Attorney-General must first show that whatever obligation of secrecy or discretion attaches to former Cabinet ministers, that obligation is binding in law and not merely in morals".[5]

This distinction between the morally and legally binding nature of an oath poses obvious problems for enforcement, if courts are prepared to hold that the obligation is binding "merely in morals" and not in law. It is worth noting the definition given recently by David M. Walker, Regius Professor of Law at the University of Glasgow: "An assertion or promise made in the belief that supernatural retribution will fall on the taker if he violates what he swears to do."[6]

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4. Attorney-General v Jonathon Cape Ltd., (1975) 3 All E.R. 484.

5. Ibid., pp. 492-3.

6. David M. Walker, The Oxford Companion to Law (1980), p. 896.

The essential characteristic is that if the person taking the oath swears falsely he believes he has subjected himself to "some superhuman moral retribution". Discussion of this point in Wigmore in Evidence in Trials at Common Law (1976) attests to the supernatural influence attributed to the truth-telling efficacy of the oath.[7] It is the supernatural sanction upon which the oath's primary effectiveness is based: "the essence of an oath is an appeal to a Supreme Being in whose existence the person taking the oath believes and whom he believes to be a rewarder of truth and an avenger of falsehood".[8]

The foregoing indicates why it was that Lord Chief Justice Widgery suggested in the Jonathan Cape case the oath has no strictly binding force in law. That does not mean that there are no potential legal consequences for the person who swears falsely. The Criminal Code is quite clear about the offences:

1. of perjury, viz., the person "who, being a witness in a judicial proceeding, with intent to mislead gives false evidence, knowing that the evidence is false" (sec. 120);

2. of false statements in extra-judicial proceedings, viz., the person "who, not being a witness in a judicial proceeding but being permitted, authorized or required by law to make a statement by affidavit, by solemn declaration or orally under oath, makes in such statement, before a person who is authorized by law to permit it to be made before him, an assertion with respect to a matter of fact, opinion, belief or knowledge, knowing that the assertion is false" (sec. 122); and

3. of offences to evidence in a judicial proceeding and to purported affidavits (secs. 124 to 127).

To the extent that the foregoing apply, potential criminal sanctions probably act as well as an inducement to truth-telling. In this respect, the views of Blackstone, in Commentaries on the Laws of England, on oaths of allegiance, are interesting.

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7. Wigmore, Evidence in Trials at Common Law (1976), pp. 382-386 from VI.

8. R. v. Defillipi, (1932) 1 W.W.R. 545, 546 (Alta. C.A.).

He states:

> The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the social tie by uniting it with that of religion. (authors' emphasis).[9]

The duration or term of an oath seems to be principally a function of the words of the oath itself. For example, the privy councillor's oath, (reproduced in Schedule D), includes an obligation to "keep close and secret all such matters as shall be treated, debated and resolved on in Privy Council, without publishing or disclosing the same or any part thereof," but contains no indication of how long that duty is to last. In the context of constitutional principles that place high importance on cabinet solidarity and on confidential dealings between ministers and the sovereign, this absence of chronological limitation and the applicability of the obligation to past proceedings and past ministers are hardly surprising.

(h) Sanctions and Penalties

It is important to determine whether, and which, sanctions or penalities constitute an effective deterrent or appropriate enforcement mechanism in conflict of interest situations.

Current guidelines for public officials on conflict of interest contain few specific administrative or legal sanctions. Compliance with ethical principles and standards is encouraged through disclosure, disqualification or divestment. Honour and personal choice are criteria which former officials are encouraged to use in determining the applicability of post-employment guidelines to their commercial activities.

Administrative sanctions, up to and including discharge of public servants are nevertheless applied by departments for violation of their codes of conduct. Governor-in-Council appointees, appointed 'at pleasure', can face similar disciplinary measures.

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9. Blackstone, Commentaries on the Laws of England (New York W.E. Dean, 1846), Vol. 1, Bk. 1, p. 369.

The United States Ethics in Government Act (18 USC #207) specifies penalties of $10,000 or imprisonment of not more than two years for violation of its provisions. Criminal enforcement of this Act is the exclusive responsibility of the Attorney General of the United States.

In the extreme conflict of interest cases, those caught by provisions in the Criminal Code, there are also serious penalties which can be levied against those found guilty of serious offences.

Beyond that, there are very vague administrative sanctions, as noted above, "up to and including discharge." A review of the disciplinary proceedings taken by Treasury Board from time to time revealed that these administrative sanctions are in fact applied.

The one other penalty in this area is that of publicity. The glare of publicity is a crude instrument with which to mete out justice, and can affect the innocent and guilty alike. Still, bringing to light wrong-doing cannot be ignored as a sanction, both as it applies to the parties involved and as a salutory influence on others. For elected public officials, the penalty of adverse publicity can be greater than any other sanction, since it can effectively bring an end to a career in public office.

Building the provision for publicity into a system of sanctions can also take the form of providing for routine disclosure of matters of unethical conduct. This is currently done where the decisions of arbitration boards are released following investigations of particular problems in the rendering of verdicts on them. Under the operation of the Office of Public Sector Ethics, as outlined in Chapter 13, the method by which the Ethics Counsellor makes public reports of his or her investigations can further this use of publicity as a penalty.

(i) The Relationship Between the Public and Private Sectors

A particular focus of the Task Force was the need to attract to government individuals of high calibre from all walks of life while ensuring that the public trust is, and is seen to be, safeguarded.

Much attention has been paid to the mobility of individuals between the public and private sectors since the report of the Task Force on Business-Government Interface: How to Improve Business-Government Relations in Canada" in 1976 down to such recent publications as Linking Canada's New Solitudes, a report from the Conference Board of Canada in July 1983 on the Executive Interchange Program and business-government relations.

In the course of meeting with individuals from the private sector, we came to realize that a gulf exists between the public and private sectors in Canada which cannot be considered, broadly speaking, to serve the Candian public interest. As you wrote in Canadian Business in August 1981, Prime Minister, "Canada's most famous novel ... Two Solitudes ... talks about cultural isolation of Anglophones and Francophones ... but another two solitudes exist -- business and government."

Businessmen and public servants do not know enough about each other or each other's environment. In the case of senior corporate officials, understanding of government structures is particularly important to conserve time which would otherwise be spent "probing" the structure to locate decision centres and to reduce uncertainties. Government ministers and officials should be as well informed as possible about how business operates.

The Task Force on Business-Government Relations in Canada recommends that:

d) additional methods of bringing knowledgeable persons from the business community -- in part as an alternative to increasing the size of the public service -- should be explored systematically and used to supplement regular personnel management procedures. These methods would include more hiring by contract for specific term appointments; minimizing problems resulting from difficulties in transferring pension credits and security; etc.

Some existing government policies which hinder "interchange", such as conflict of interest regulations and the right of public servants to preferential considerations for job openings, should be reviewed to determine if their adverse impact on interchanges between government and business can be reduced for certain specified positions; and

e) the present Career Assignment and Executive Interchange Programs should be expanded greatly to include officials from unions and assignment to non-profit research institutes and major business organizations. The feasibility of expanding the present limited exchange should also be reviewed.

The interchange idea is not new. The Conference Board publication in July 1983 examined half a dozen proposals regarding business-government personnel exchanges made since the mid-1960s, and observed:

> There is a certain piquancy to these recommendations, for such a program already existed when all these statements were made -- the federal government's Executive Interchange Program (EIP). Though it was in place while all these recommendations were formulated, it was relatively little used by private firms compared to other approaches to improving business-government relations.

We spoke with several individuals who participated in the Executive Interchange Program, and the evaluation of its role and effectiveness was most positive. We also examined brochures describing the program of Interchange Canada (the federal program of personnel exchange) and the wording of the Interchange agreement to see its provisions with respect to conflict of interest. There are two types of Interchange agreements, one for participants from the private sector, a municipal or provincial government or a Crown corporation coming on a temporary basis to the public service of Canada, the other for a federal public servant on assignment to the private sector, a university, a municipal or provincial government, or a Crown corporation. In the latter, there is no reference to conflict of interest matters. Officers of Interchange Canada put a great deal of emphasis on conflict of interest when discussing interchange arrangements with managers in departments and with private sector managers. Apparently managers considering exchanges of personnel are aware of the potential for conflict and are quick to ensure there is none. Moreover, the employee on assignment to the private sector is still bound by his or her Oath of Office and Secrecy. There are no recorded incidents of conflict of interest problems where an employee has gone to the private sector on an interchange assignment.

With respect to the other type of agreement, governing individuals coming into the federal public service from the private sector, the following wording forms part of the contract:

> It is agreed that the assignment shall be considered to be "employment" for purposes of the Official Secrets Act and _____ will be bound by Section 4 of that Act regarding wrongful communication of information, etc. It is also agreed that the Conflict of Interest Guidelines shall apply to _____ and that declaration of actual or potential conflict of interest shall be made prior to the commencement of the assignment.

The Personnel Management Manual, in the section dealing with Executive Interchange states that, "in selecting assignments for their executives, or before accepting executives on assignment, departments should satisfy themselves that security and conflict of interest are not significant risks inherent in the arrangement."

The federal program of personnel exchange appears to be working well, but only within a narrowly defined range. For instance, a sampling of 703 firms conducted by the Institute for Political Involvement showed that fewer than five per cent were involved with either the Executive Interchange program or its middle management counterpart, the Career Assignment Program. Another factor is that the program envisages temporary exchanges only, whereas we believe it is important, in terms of the general improvement of relations between the public and private sectors, to encourage people of ability from the private sector into government for a longer-term or on a permanent basis. Recruitment might also be made from the professional and labour organizations as well as the business corporations.

No single measure will remove the isolation between Canada's new "two solitudes". A range of measures, including the policies of government and the attitudes of opinion leaders in both government and the private sector, is necessary to bring about a change or improvement in this area. The present conflict of interest rules cannot be blamed for causing this problem, but they may be one of a number of contributing factors restricting movement of qualified people into the public service of Canada, in some cases. We are not saying that such rules should be eliminated, nor do we imply that those deterred from entering government are the kind of people who would have problems in conducting themselves ethically. The problem is more functional, having to do with the mechanical application of rules regarding divestiture of assets which have produced unnecessary hardship and financial loss in cases where there was no need to require divestment and excessive regulations on post-employment activities. The recommendations in this report are intended to help alleviate that particular problem.

CHAPTER 12

REFORMULATION OF THE RULES

(a) Overview

The current guidelines applying to ministers, ministers' exempt staff, Governor-in-Council appointees and public servants consist of a mixture of two elements: (1) what can be termed principles of conduct, and (2) procedures to minimize conflicts of interest, such as requirements for sale of assets, divestiture by way of trusts, disclosure and so forth.

We propose that the current guidelines applicable to ministers, ministers' exempt staff, Governor-in-Council appointees and public servants be replaced by:

1. A code of ethical conduct. This code would embody principles extracted from the present guidelines, redrafted to incorporate certain additional principles of conduct, and be binding upon all public office holders.

2. Procedures to minimize conflicts of interest. These procedures would be in the form of regulations made by Governor-in-Council. These procedures would be similar to those included in the present guidelines, such as prohibited activities, disclosure, and divestment of assets by sale or by trust arrangements. In reformulating procedures in the present guidelines for this purpose, they should be modified to give greater flexibility in administration, and applied on a functional basis. By "functional" we mean that the scope and content of the procedures would be related to the category and rank of the public office holder and, where practicable, reflect differences in the duties and responsibilities of public office holders.

3. Supplemental procedures. Whatever special rules are necessary to meet the particular conflicts experienced by various departments, Crown corporations and government agencies, they should be embodied in supplemental codes of procedures and rules appropriate to them.

These three would be a hierarchy, the code stating over-arching principles, the procedures establishing ways to comply with those principles, and the supplemental procedures

providing fine-tuning where necessary. All three must be compatible, the procedures and supplemental procedures being derived from the principles in the code. There should not be duplication among the three.

(b) Problems with Rules Expressed in "Guidelines"

Widely divergent views exist as to the binding effect of the current guidelines. Some take the position that the guidelines have the same force as law and must be obeyed while others hold the view that they are in English, "merely guidelines", i.e. they indicate the behaviour or practice that ought to be followed but are not as binding in their effect as a law would be.

This ambiguity of interpretation is as likely to occur to those thinking and working in the French language than in English, since the French equivalent of "guidelines" is "les lignes directrices", although this is not always the expression used. For example, the Governor-in-Council Guidelines employ "Lignes de Conduite" and the Public Servants' Guidelines "Normes de conduite". This simply argues further for our view that the expressions "guidelines" and "les lignes directrices" are best abandoned in any reformulation of the present rules.

In the case of present guidelines developed other than by Order-in-Council, such as those developed by specific departments and agencies, the binding effect may be even more open to question. However, as to a legal basis for such guidelines or codes, the authority to determine rules governing the conduct of employees in the public service is derived from section 7(1)(f) of the Financial Administration Act, which states that Treasury Board may "establish standards of discipline in the Public Service". Further, section 106 of the Public Service Terms and Conditions of Employment Regulations, made pursuant to section 7 of the Financial Administration Act, permits a deputy head to establish and administer standards of discipline, subject to any enactment of the Treasury Board.

Even so, problems of interpretation remain, primarily because the wording common to the guidelines or supplemental codes in a number of instances is hortatory, tending to indicate what should or ought to be done, rather than what must be done. In some respects, it is inevitable that rules in the realm of ethical conduct must be stated broadly, and we have already recorded our view that this is preferable to the route followed in several other jurisdictions of trying to particularize every conceivable problem and to deal with it by a specific rule. We do not dispute that it may be fairer for individuals to face rules precisely stated, and concisely limited, so that they can benefit from legal advice in the course of trying to interpret whether they have

violated the ethical code. Lawyers would prefer precise language, and several submissions were received from legal advisors in the Department of Justice and other federal departments concerning the need to avoid loose and ambiguous language so that people could understand clearly what their rights are.

This is not a new problem; a continuing dilemma exists because of the tension between two schools of thought: one emphasizing the legal rights of individuals and therefore favoring drafting laws as narrowly and precisely as possible, the other favoring an administrative rather than due process orientation and looking to broadly stated wording capable of interpretation in particular cases as they arise. This is all the more important in light of the Charter of Rights and Freedoms. We have borne this in mind, and try to strike the right balance. We favour a compromise between the approaches of legalism and pragmatism, as will be seen in the type of wording recommended for the code of conduct.

(c) Abstracting the Essential Provisions from the Present Guidelines

The present guidelines contain an amalgam of basic rules and procedures. The supplemental codes devised by various departments and agencies go further, and add to the basic rules and procedures that relate to ethical conduct, a variety of other instructions, rules, and various forms of advice.

While we can appreciate the desirability, from the point of view of public administration, of the Director of Personnel for a government department being able to hand a single booklet to a new employee, saying "Here, read this, it contains everything you need to know about the rules and procedures to be followed in this department," a comprehensive document may have two shortcomings. Some are so lengthy that they may never be read by employees, although we do not discount the utility of a reference handbook in times of need. Second, combining in one text matters ranging from Criminal Code provisions and guidelines for ethical conduct down to rules about punctuality and clothing tends to trivialize the more serious concerns.

We believe there is singular merit in separating from a general and comprehensive statement of all rules of conduct the few basic principles which can be said to be overarching and which establish the fundamental framework of ethics.

(d) A Code of Ethical Conduct

The Code of Ethical Conduct which we recommend is a distillation of the rules or basic principles developed over the past 10 to 15 years at the federal level. We recognize that

considerable time and effort has gone into their formulation, and we do not propose to discard either the nature or wording of those principles. However, in some cases we have blended earlier wording into shorter and more concise statements, and have made several additions to encompass new fields of concern which might properly be brought within the ambit of a general code of ethical conduct. In effect, we have blended the present wording of federal guidelines with the principles stated in Chapter 3 of this report which identify improper forms of conduct for those in government service and state principles which should govern in each case. The revised code follows.

CODE OF ETHICAL CONDUCT

Preamble

Service to one's country is a noble calling. Individuals holding public office, whether with great or modest duties, carry with them a portion of the responsibility for the destiny of our country and a part of the public trust which all Canadians vest in government.

The public trust rests on a belief and confidence that those in public offices will conduct themselves in an ethical fashion.

In furtherance of these precepts, the following principles shall be binding upon each public office holder.

Principles

1. It is by no means sufficient for those persons holding public office in Canada to act within the law. There is a further obligation to act in a manner that will bear the closest public scrutiny.

2. Any conflict between the private interests of public office holders and their official duties must be resolved in favour of the public interest. Upon appointment to office, and thereafter, public office holders are expected to arrange their private affairs in a manner that will prevent such conflicts of interest from arising.

3. Public office holders shall neither solicit nor, other than for incidental gifts or customary hospitality of nominal value, accept transfers of economic value from private sources, even though no bribery is involved. This principle applies where the transfer is discretionary as distinct from being pursuant to an enforceable contract or property right of the public official.

4. Non-elected public office holders shall not, without prior approval of their superior, step out of their official roles to assist private entities or persons in their dealings with the government where this would result in preferential treatment.

5. Public office holders shall not knowingly take personal advantage of or private benefit from information obtained in the course of their official duties which is not generally available to the public.

6. Public office holders shall not directly or indirectly use, or allow the use of government property of any kind, including property leased to the government, for anything other than officially approved activities.

7. Non-elected public office holders shall not engage in partisan political activities which impair the political neutrality, either real or perceived, of the public service.

8. Non-elected public office holders shall not express publicly their personal views on matters of political controversy, or on government policy or administration (apart from collective bargaining issues), where this is likely to impair public confidence in the existing or subsequent performance of their duties or which is likely to impair relations with other governments.

9. Public office holders shall not engage in personal conduct which exploits for private reasons or personal gratification their position of authority, or which would tend to discredit the professionalism of the public service.

10. Public office holders have a duty not to act, after they leave office, in such a manner as to cast doubt on the probity and impartiality of the governmental process or in any other way to diminish public confidence in the integrity of government.

This Code shall be binding on each public office holder. For purposes of this Code, a " public office holder" means officers and employees of Her Majesty in right of Canada, and for greater certainty, includes ministers; parliamentary secretaries; Governor-in-Council appointees; public servants; exempt staff members; officers, directors, or employees of federal boards, commissions, tribunals, Crown corporations and other agencies; officers and employees of the Parliament of Canada; and members of the Canadian Armed Forces and the Royal Canadian Mounted Police. "Non-elected public office holders" means all public office holders except ministers, parliamentary secretaries, and ministers' exempt staff.

(e) Procedures to Minimize Conflicts of Interest

We also recommend abstracting from the present guidelines those rules and procedures to be used to assist individuals to minimize the risk of conflict of interest, in keeping with the general principles stated in the Code of Ethical Conduct. The result would be called "Procedures to Minimize Conflicts of Interest," and could take the form of regulations made under the Ethics in Government Act.

We envisage the statement of these procedures being like much of the current content of the guidelines, dealing, for example, with such matters as divestment by certain groups (such as ministers and Governor-in-Council appointees), the use of trust arrangements, disclosure provisions, a description of assets exempt from divestment rules, and so forth.

The "Procedures to Minimize Conflicts of Interest" should not be thought of, we must stress, as a way of implementing the Code of Ethical Conduct. The Code, as enacted by Parliament, will by its wording be binding on the entire federal public sector, and each individual will have personal responsibility for ensuring that he or she is in compliance with the Code. It is not the duty of the Ethics Counsellor nor the Office of Public Sector Ethics to "enforce" the Code, nor their responsibility to ensure that everyone is complying.

Obviously, senior public office holders, such as ministers, deputy ministers, heads of boards and others, could not comply in certain respects with the general principles of the Code without in fact using the divestment procedures (in essentially the same way they do now).

We do not consider it within our terms of reference to recommend detailed procedures to minimize conflicts of interest to fit the circumstances of the wide range of public office holders. Our emphasis is on "approaches", as you requested in your letter to us, Prime Minister. Nevertheless, several suggestions are made which we trust will be considered when these procedural rules are reformulated.

First, we envisage that the Procedural Rules to Minimize Conflicts of Interest will be set out category by category, starting with ministers, then ministers' exempt staff, then deputy ministers and heads of agencies, then Governor-in-Council appointees, and so on through several classifications for the public service. This will make it easier for individual public office holders to readily locate the procedures applicable to them, will facilitate the development of procedures appropriate to their rank and classification, and is consistent with the functional approach we describe later in this chapter.

Second, the procedures should deal, as do the present guidelines, with such matters as the following.

1. The types of business, investment, professional or other activity considered incompatible with holding a public office of a particular rank or classification should be stated. This will indicate to each office holder the type of assets or activities which can reasonably be expected to create conflicts of interest, and which therefore should be divested or ceased (as the case requires) as a preventative procedure.

2. Assets and activities exempt from this preventive procedure should be described. Present guidelines, for example, provide detailed lists of exempt assets, and specify circumstances in which public office holders can continue to serve as officers and directors of private organizations and corporations of a philanthropic or educational nature. These are assets and activities not likely to give rise to conflicts of interest, and which therefore need not be encompassed by preventative procedures of divestment or cessation.

3. Various methods of divestment (such as sale of assets, or use of a trust) should be laid out, with explanations of which types are most appropriate given a public office holder's particular situation. More particularly, the types of trusts (frozen, blind, retention, or other) which are permissible in various cases, and the method for putting one's holdings in trust, including the duration of trusts, selection of trustees and filing of trust documents, should all be described.

4. A de minimis rule should be considered wherever appropriate, with respect to assets one should divest of, so that public office holders are not required to follow elaborate and sometimes expensive procedures in order to eliminate what sensible people would regard as a very minor potential or apparent conflict of interest.

5. Use of public disclosure as a technique for dealing with conflict of interest situations could be enlarged, and we recommend that it be resorted to in all possible cases.

6. Since it will not be possible to deal with all cases fairly and reasonably in the regulations, it would be appropriate to give some discretion with respect to operation and application of the procedures. The procedures for requesting an exemption from a rule in a particular case must be specified.

7. Where information about a public office holder's assets has been disclosed to a superior or to the Ethics Counsellor, on a non-public basis, procedures to ensure its confidentiality must be provided.

8. Where officials are required to disclose to their superiors offers of employment, the procedures and time limits for doing so must be specified.

9. The procedure for seeking and giving advice and guidance to individuals, departments or central agencies must be specified.

(f) The Functional Approach to Conflict of Interest Rules

As to the application of the "Procedures to Minimize Conflicts of Interest", we recommend a functional approach, by which it is intended that while all public office holders, regardless of rank, including ministers, should be subject to the same code of ethical conduct, any procedures they must follow to minimize conflicts of interest, such as sale of investments, disclosure, establishment of trusts and so forth should depend upon the nature of their duties and responsibilities in relation to their rank and classification.

By this test, all ministers should be required to conform to the most comprehensive of the procedures to minimize conflicts of interest since, whatever their individual departmental responsibilities, they are members of Cabinet and consequently participate in decision-making and share confidential information at the highest level on a collegial basis.

Application of the functional approach might seem to indicate that distinctions could be made amongst deputy ministers but, as decision-making in the federal government is now organized -- the widespread practice of interdepartmental discussions, the envelope system and so forth -- we recommend that the same scope of procedures to minimize conflicts of interest while in office should apply to deputy ministers as to their ministers.

It may be necessary to require certain other public office holders to follow the same comprehensive procedures as apply to ministers and deputy ministers because of the nature of their duties and responsibilities. Care should be taken, however, to avoid unnecessary procedures just for the sake of simplicity of administration. We reiterate the importance of fairness, simplicity and reasonableness.

Below the most senior levels of ministers and deputy ministers, the procedures for minimizing conflicts of interest should vary according to the duties and responsibilities of the public office holder. The more comprehensive those duties and responsibilities, for example, the more comprehensive the requirements to divest. The narrower the specialization of those duties and responsibilities, the narrower the scope of divestment.

This functional approach conforms with our view (explained in Chapter 16) that the members of the quasi-judical agencies should be governed by restrictions clearly stated in the statutes that govern their operations, relating specifically to the industry or activity that they regulate. Thus, as the National Energy Act now requires, members of the National Energy Board must not hold securities of energy companies.

This approach also conforms with our views about Crown corporations and those appointed by the Governor-in-Council to executive positions in those corporations. Each Crown corporation operates in a different field and faces unique problems as well as common problems in relation to conflict of interest. All officers and employees should be subject to the code of ethical conduct and all Crown corporations should, as a minimum, live up to accepted standards of the private corporate world. Because they are in the public sector, however, they should in addition be requested to develop and submit for government approval specific rules about conflict of interest applicable to their officers and employees.

Within departments, below the rank of deputy minister, the functional approach already operates in principle, in that whatever divestment, or ineligibility for participation, may be necessary to avoid conflict of interest depends upon the private interests of the employee in relation to the duties he or she is required to perform. The responsibility is upon the employee to acquaint the deputy minister with his or her personal interests which might conflict with public duties and for the deputy minister to decide how best to minimize or remove the conflict.

With respect to exempt staff in ministers' offices, some of whom have access to Cabinet documents and participate in discussion of government policy, the more they know and the more they participate, the greater is the need for comprehensive

procedures for divestment. Conversely, we see little point in applying divestment requirements to ministers' constituency staff.

The functional approach could also apply to parliamentary secretaries, although we know, as former Cabinet ministers, that the responsibilities assigned and carried out by their parliamentary secretaries depend so much upon the practices of individual ministers.

Ambassadors, high commissioners and consuls general, although appointed by Governor-in-Council, should be treated, from the point of view of conflict of interest, as employees within the Department of External Affairs.

(g) The Rationale for Supplemental Codes

We reviewed earlier how, in 1973, Treasury Board invited departments and agencies to develop supplemental codes of conduct, to augment the general guidelines applicable to all public service employees in cases where a particular department or agency considered it appropriate. In considering a reformulation of the rules governing ethical conduct, we must now turn to these supplemental codes.

The rationale for supplemental codes springs from the reality that government is a multi-faceted operation, and that rules of general application can only be stated in broad overarching terms. To address the unique problems that arise in Air Canada, the Department of Agriculture, or the Department of Communications, specifically tailored rules are needed. Supplemental codes are an efficient mechanism in that detailed rules applicable to those inspecting aircraft, or analyzing crop yields, or handling the government's short-term investments obviously apply only to a small coterie of individuals within the overall government structure, and there is little point in having all of these detailed provisions contained in a single manual for the entire government.

A recent paper by H.L. Laframboise points out the inherent danger in the proliferation of service-wide controls and over-emphasis on conformity with centrally prescribed rules and policies which, he asserts, "have seriously damaged the free play of conscience and discretion in the value system of the federal public service. Managerial behaviour, as a consequence, now responds excessively to accountability to others, defined as 'dependent accountability', and insufficiently to individual conscience..."1

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1. H.L. Laframboise, "Conscience and Conformity: the Uncomfortable Bedfellows of Accountability," Canadian Public Administration, 26, No. 3 (1983), p. 341.

Some departments developed codes well in advance of the 1973 suggestion to do so but supplemental codes have developed chiefly since 1973. Schedule B lists, as far as could be ascertained, all supplemental codes now in existence, some 112 in number, including those of departments, agencies and Crown corporations. They are included with this report and also have been placed with the Assistant Deputy Registrar General where they may be consulted.

As to the nature of existing supplemental codes, three general observations are made.

1. Some supplemental codes are extremely brief, and do little more than adapt or summarize wording of relevant statutes, dealing with such matters as bribery, receipt of gifts, political activity and the like. These codes constitute, in effect, little more than a restatement of rules found elsewhere.

2. Other codes represent a considerable effort to devise additional rules appropriate to the department or agency, and to make them fit together as part of an overall manual to guide employees in their work.

3. As can be expected given the large number of authors involved, they are written in different styles, often employing different approaches to the subject, some being set in mandatory terms, others in hortatory fashion; some being framed in negative formulation as a series of "do's and don'ts", while others stress the importance of conducting oneself in a positive and professional fashion in carrying out public business. There is a great diversity in the terms, definitions and expressions used from one code to another.

The supplemental guidelines of the Departmental of External Affairs, the Department of Employment and Immigration, Office of the Auditor General, the Canadian Broadcasting Corporation and the Bank of Canada are examined below. Although the intent of all five appears the same in terms of eliminating actual and apparent conflict situations, there are major differences. They share two factors in common: all include supplementary guidelines with specific provisions applicable to the agency or department and all describe the procedure for disclosure of actual or potential conflict situations. Those of External Affairs and Employment and Immigration are similar in providing copies of the guidelines and explaining their legal basis, and supplying explanatory notes, examples of conflict

situations, notes on gifts, dress and political activity, and an explanation of application of the code to employees serving abroad.

The External Affairs code is the only one containing a caution regarding conflicts involving spouses and dependents. The CBC and Bank of Canada documents deal primarily with issues that are strictly conflicts of interest. While neither includes the 1973 guidelines which promoted them, paraphrased versions are the basis of both documents. These two sets of guidelines emphasize operation of the organization; they do not deal with employee conduct outside the realm of conflict of interest.

The two-part document of the Office of the Auditor General differs from the others. It deals first with employee professionalism and integrity, the objectivity required of auditors and the pursuit of excellence in government, addressing areas of conduct applying particularly to auditing functions. Secondly, it considers identification and avoidance of conflicts of interest indicating that employees are bound by the 1973 guidelines and spelling out how they apply. This is the only one of the five codes to mention restrictions applicable to post-employment activities.

Prohibited social invitations and reasonable exceptions are described by Employment and Immigration, while External Affairs stresses the need for objectivity by employees making recommendations or offering advice on the type and size of grants and contributions that may be made from public funds to national, international and other organizations or individuals. The document of the Office of the Auditor General asserts that "staff members who are public servants, first and foremost, work for the Office of the Auditor General of Canada. This takes precedence over any other working relationships." Secondary employment relating to government activities, directly or on behalf of a third party, constitutes conflict of interest and is not allowed.

One example of the type of matter which may in the future be dealt with in greater detail in a supplemental code is the use of government property. Principle 6 of the proposed Code of Ethical Conduct states that "Public office holder shall not directly or indirectly use, or allow the use of government property of any kind, including property leased to the government, for anything other than officially approved activities." To provide procedures whereby public office holders may understand and comply with this principle, it may be helpful to spell out particular rules in this regard where the general principle would not suffice. For instance, there are cases where government laboratories and testing facilities are sometimes required by individuals employed by the government to conduct scientific

testing or prepare reports in connection with giving expert testimony in civil litigation, for which they are remunerated separately by private sources. Without being able to use such facilities for testing, they may not have adequate documentation to adduce before the court in relation to the matter in which they have been called as expert witnesses. Problems such as this do exist in the public sector, and detailed rules in supplemental codes may be of assistance to all concerned.

To date, the government has not issued specific directions regulating the use of government property, supplies and equipment for other than official purposes, but several departments have formulated internal rules, and a few have chosen to include them in their supplemental codes of conduct. To illustrate such existing supplemental code provisions, three examples follow, each based on the underlying principle that the unauthorized use of government property is prohibited.

The Human Rights Commission rules on Use of Commission Property state: (1) The use of Commission premises, equipment and supplies for commercial enterprise for personal gain is prohibited; and (2) The unauthorized use by an employee of Commission premises, equipment and supplies for private purposes is not permitted.

Revenue Canada (Taxation) rules on Use of Government Property state: You must not use Government of Canada property or the services of another employee during working hours, at any time, for other than approved activities. All government property entrusted or issued to an employee must be reasonably protected and conserved; it must be surrendered on request by authorized departmental officials.

Royal Canadian Mounted Police rules on Use of Departmental Property state: (1) You are forbidden to use RCMP premises, equipment or supplies for the conduct of commercial activities for personal gain. (2) You are not permitted to use RCMP premises, equipment or supplies for private purposes unless authorized by your CO/director/head autonomous branch to do so.

Given the importance of having supplemental codes, and in light of our concern to make all rules relating to ethical conduct simple, fair and reasonable, we recommend that the existing codes fall appropriately to the Office of Public Sector Ethics. It is envisaged that, after the existing supplemental rules have been restated, the Ethics Counsellor will provide a draft to the deputy minister or head of the agency, at which time the latter can confirm that the reformulation is satisfactory for the purpose of the department or agency or, if not, he or she and the Ethics Counsellor can discuss and settle on appropriate wording.

As a result of this approach, all departments, boards, commissions and agencies which have supplemental codes will find they are operating under terminology and procedures that are the same. This will facilitate efforts to educate public servants about the appropriate procedures to follow, will simplify the procedures and make it easier when public servants move from one department to another. It will also be of greater assistance when deputy ministers move from one department to another, since they have primary responsibility for the code of conduct within their department, to find that the same terminology and procedure apply throughout the government.

It must be clearly understood that we do not envisage that the Ethics Counsellor will write the detailed rules for departments, in the sense of deciding what is right or wrong in terms of specific rules for ethical conduct; rather the Ethics Counsellor will simply assist departments and agencies to restate in a common format the rules which have already been developed by departments and agencies.

The ultimate responsibility for the text of the rules and for the administration would continue to rest upon the deputy minister or head of agency.

CHAPTER 13

FORMATION OF AN OFFICE OF PUBLIC SECTOR ETHICS

(a) Introduction

The central theme of our proposal is the formation of an Office of Public Sector Ethics.

We begin this chapter by reviewing the role of the Assistant Deputy Registrar General (ADRG), the Treasury Board and the Public Service Commission, to consider how the proposed Office of Public Sector Ethics can evolve from the present arrangements. We then turn to a detailed examination of the way the Office would be constituted, its role, and its relationship with others. The position of the person who would head this Office - the Ethics Counsellor is also considered.

(b) Present Role of the Assistant Deputy Registrar General (ADRG)

The Office of the ADRG was established in May, 1974. The ADRG is responsible for the administration of the federal government's policy on conflict of interest through the application of the various conflict of interest guidelines for ministers of the Crown, their exempt staff, and persons appointed to public office by the Governor-in-Council.

This Office is located in the Department of Consumer and Corporate Affairs. On May 9, 1974, the Treasury Board approved the required resources for the Office of the ADRG with a staff of 12 for the administration of the conflict of interest activity for those groups mentioned in the previous paragraph. (The ADRG is also responsible for the provision of the registration and issuance of documents required of the Registrar General of Canada in various Acts and Regulations, particularly the Formal Documents Regulations, and for the proper use and safekeeping of the Great Seal of Canada, the Administrator's Seal, the Privy Seal and the Seal of the Registrar General of Canada.)

On May 17, 1974, David R. Taylor was appointed the first ADRG. The Director, Standard of Conduct Advisory Group, G.J. Robert Boyle, joined the Office on June 3, 1974.

On assuming office, the ADRG took over the full responsibility for completing the arrangements that Cabinet ministers were making to comply with the Prime Minister's directive of December 28, 1973, regarding the Cabinet decisions relating to the implementation of the conflict of interest régime for ministers. The personal confidential files of each minister, that had previously been held in the Privy Council Office, were transferred to the ADRG. The first priorities, to complete the arrangements required for ministers, draft the guidelines for Governor-in-Council appointees and establish the operations of the Office of the ADRG, were met before December, 1974.

The major functions of the Office of the ADRG, therefore, are:

- to administer the conflict of interest guidelines applicable to Lieutenant-Governors, ministers, their designated exempt staff, Governor-in-Council appointees working full time and other individuals to whom similar guidelines are applicable;

- to advise and assist these individuals to arrange their personal affairs in a manner that complies with the guidelines in order that real or apparent conflict of interest between their private interests and the interests of the public is avoided;

- to provide the Prime Minister and ministers with the information they require to make decisions concerning conflict of interest matters;

- to ensure the effective administration of frozen trusts for which the ADRG is the trustee, and to provide essential financial information relating to these trusts to those who established them;

- to approve the trust agreements prepared by individuals holding public office to comply with conflict of interest guidelines when such individuals seek reimbursement of trust costs as authorized by government policy, and to approve such reimbursement by the department or agency;

- to operate a Public Registry which contains 'Conflict of Interest Statements' and 'Public Declarations' of individuals who are in compliance with the guidelines to which they are subject;

- to ensure that the Government's policy and guidelines on conflict of interest for Lieutenant-Governors, Cabinet ministers, ministers' exempt staffs, and Governor-in-Council appointees are complied with, and are not breached either through an oversight or otherwise; and

- to provide, as requested, advice and assistance to departments and agencies in preparing special or supplementary guidelines due to their special activities, and to review same to ensure that they are consistent with the government's policy on conflict of interest.

The specific activities of the Assistant Deputy Registrar General in furtherance of these primary functions include the following:

- implementing, applying and administering the government's policies and guidelines on behalf of the Prime Minister, and with extensive delegated authority, through the Clerk of the Privy Council;

- approving the conflict of interest arrangements made by Governor-in-Council appointees and ministers' exempt staff to whom guidelines are being applied and informing the minister responsible accordingly;

- seeking the approval of the Prime Minister after having satisfied himself or herself that the conflict of interest arrangements made by Cabinet ministers are appropriate;

- resolving difficult, sensitive or new issues that arise in the implementation of the conflict of interest policies or in the application of the guidelines;

- arranging for an independent auditor to review trusts administered by the ADRG in trust and report his or her findings to the Prime Minister and the Comptroller General; and

- keeping the Prime Minister and the Clerk of the Privy Council informed on the compliance of individuals subject to guidelines administered by the ADRG and on other conflict of interest matters.

In November, 1974, the guidelines for Governor-in-Council appointees were approved by Cabinet. Initially, senior appointees were asked to comply with the guidelines and subsequently other appointees such as ambassadors, high commissioners, consuls general and senior RCMP officers were asked to comply. On June 2nd, 1975, the Prime Minister requested that the ADRG prepare guidelines for members of ministers' exempt staff and administer them on his behalf. These guidelines, which are similar to those governing ministers, were approved on November 20, 1975 and staff members so designated by the ministers were asked to comply with them.

Over the past decade, the ADRG participated in the development of most of the policies and guidelines affecting appointed officials and public servants, including the guidelines for ministers of the Crown issued by former Prime Minister Clark on August 1, 1979 and by Prime Minister Trudeau on April 28, 1980.

In February 1982, further to a Cabinet decision, Treasury Board issued the new government policy on reimbursement of certain costs of trusts which assigned to the ADRG the responsibility for approving the trusts involved and the reasonable costs claimed.

The office of the ADRG currently comprises the Assistant Deputy Registrar General, the Director, Standard of Conduct Advisory Group, three senior advisors, one advisor, three secretaries, one clerk and one administration and trust officer.

On an ongoing basis, the arrangements of about 50 appointees are under negotiation, reaching close to 200 when a major cabinet shuffle occurs, and over 300 when there is a change of government.

The ADRG is responsible to the Prime Minister and the Clerk of the Privy Council for matters relating to conflict of interest and to the Deputy Minister of Consumer and Corporate Affairs for the administration of the Confict of Interest Organization and for all matters relating to the functions of the Registrar General of Canada, i.e., the Minister of Consumer and Corporate Affairs.

(c) Present Role of the Treasury Board

With the exception of the administration of trusts delegated to the ADRG, the responsibility for administering the Conflict of Interest Guidelines for Public Servants rests with Treasury Board. This authority stems from the Financial Administration Act which states that Treasury Board may act for the Queen's Privy Council on all matters relating to personnel management in the public service, including the determination of

terms and conditions of employment of public servants. It further states that Treasury Board may establish standards of discipline and establish the financial and other penalties, including suspension and discharge to be imposed for breach of discipline or misconduct and that these powers may be delegated to deputy heads. Although the conflict of interest guidelines for public servants were passed by Order-in-Council, they are administered by the Treasury Board for application to the public service. (The only exception is that the ADRG has the authority to administer the trust provisions of the conflict of interest policy for public servants.) Their application in an operational sense has been delegated to deputy heads. The current practice is that departments and agencies deal with all problems of conflict internally and, if unsure of what stand to take, seek the interpretation and advice of the Treasury Board. Treasury Board will give its interpretation and advice, but for the most part, departments are encouraged to make their own final decisions.

Because the authority for dealing with conflict of interest situations rests with deputy heads (through delegation), the advice they receive from the Treasury Board is not binding. On the other hand, they can be held accountable for their actions and decisions.

The type of activity in which the Treasury Board is involved in this area are:

- advising departments on the handling of particular cases of conflict of interest which arise and political activity cases not covered specifically in section 32 of the Public Service Employment Act;
- interpreting the conflict of interest and post-employment guidelines;
- assisting departments in the development of supplemental codes;
- developing and establishing service-wide policy on matters of conduct in general including conflict of interest, public expression, personal harassment and service to the public.

(d) Present Role of the Public Service Commission

The Public Service Commission is at present responsible for dealing with those aspects of political activity governed by section 32 of the Public Service Employment Act. These include politically partisan activity at the federal and provincial levels by federal public servants. The section

contains specific prohibitions against certain types of activity as well as an indication of those activities which are permissible.

With respect to political activity, the Public Service Commission:

- advises departments as to the interpretation and application of section 32 and political cases not covered by section 32;
- publishes supplemental bulletins as required;
- examines applications from individuals and approves or rejects leaves of absence to become candidates in elections or to seek nomination as a candidate; and
- conducts inquiries into allegations of violation of section 32.

The advisory committee on post-employment for public servants, as established by Appendix IV of the Post-Employment Guidelines, is currently chaired by a Commissioner of the Public Service Commission.

(e) Elevation of the ADRG's Function into a New Entity with a Clearer Mandate, Broader Powers and Higher Profile

It is clear that the present role of the Assistant Deputy Registral General has evolved with the development of the guidelines over the past decade and reformulation of the guidelines now is required. We feel that a concomitant step should be a restructuring of the function carried on until now by the Assistant Deputy Registrar General.

Since we favour, in principle, the continuation of those procedures, although in a somewhat altered form and applied on a functional basis, there will continue to be a need for some official to perform the functions now performed - and in our opinion, performed well - by the ADRG.

We recommend that this be done by elevating this function into a new entity, a body or office which would have a clearer mandate, broader powers, and a higher public profile. This new entity, the 'Office of Public Sector Ethics' would absorb the functions of the ADRG, and certain ethical conduct functions now carried out by the Treasury Board and the Public Service Commission, but would have somewhat greater responsibilities and a degree of administrative discretion not possessed by the ADRG.

We recommend calling it "The Office of Public Sector Ethics" to indicate that it is concerned with ethical conduct and particularly with matters relating to conflict of interest throughout the public sector, including Crown corporations, which, while not part of the public service, are clearly within the public rather than the private sector.

Clearer Mandate. As is evident from the history of the Office, the Assistant Deputy Registrar General operates in an area of government to which no other similar responsibilities and duties have been assigned. This we believe has tended to obscure his or her mandate with respect to conflict of interest matters - if not within the upper echelons of government, then at least in the general public perception.

Broader powers. The effective operation of an Office of Public Sector Ethics as the central focal point in the entire federal government effort to address matters of conflict of interest requires that the Ethics Counsellor have powers and authority commensurate with this task. The broader powers which should be given to the Ethics Counsellor will come about in two ways. Those powers already enjoyed by the Assistant Deputy Registrar General, the powers vested in Treasury Board, and the powers vested in the Public Service Commission with respect to matters of ethical conduct in the public service will be drawn together. Certain of these existing powers will be consolidated in the Office of Public Sector Ethics. Secondly, new powers will be added by the Ethics in Government Act, including the Ethics Counsellor's authority to conduct investigations upon request, and his or her mandate to perform an educational role with respect to ethical conduct in the public sector.

Higher Public Profile. It is also clear that the policy of the government in developing guidelines for conflict of interest, and arranging for their administration by the Treasury Board with respect to the public service, and by the Assistant Deputy Registrar General with respect to all others subject to the guidelines, was to handle the matter efficiently but quietly. In short, a low profile was chosen.

It became clear to us from our inquiries that this approach has not been successful: many people are unaware of the nature or role of the Treasury Board or the ADRG in this area and are not adequately informed as to the rules governing ethical conduct. While this is true in many cases within the government, it is manifestly so with regard to the public at large. We recommend that the Ethics Counsellor be so positioned as to have a high public profile - much of which will arise from his or her educator's role in matters of ethical conduct. An important advantage of such an elevated office lies in its actual and

perceived impartiality and freedom from political or bureaucratic bias. Its creation would be seen as emphasizing the government's willingness to air its problems in public and thus lend increased credibility and objectivity to investigations of alleged wrongdoing by public officials. By focusing all conflict of interest and related matters in one place, after all efforts to resolve such issues have been unsuccessful, the Office of Public Sector Ethics would fulfil a necessary role in establishing jurisprudence in this area.

(f) Ethics Counsellor

The head of the Office of Public Sector Ethics should, we recommend, be called the "Ethics Counsellor". We further recommend that the incumbent of this position be a senior and experienced individual with a widely recognized reputation for integrity who, by his or her stature, would maintain the dignity and authority of this position as someone in whom the government, the public service, the opposition parties, the media and the general public could repose the utmost confidence. While we do not suggest that such a person need have legal training, we propose that he or she have the stature of a high court judge.

(g) Size of the Office

As stated in Chapter 1, our recommendations, if adopted, would not likely result in any appreciable increase in the bureaucracy or the costs of administration. The size of the Office of Public Sector Ethics would not be much larger than the current operations of the Office of Assistant Deputy Registrar General which has a staff of 12.

(h) Structure and Organization of the Office of Public Sector Ethics

In order to maintain the greatest degree of independence, the Ethics Counsellor should be appointed by Order-in-Council. It is considered that the staff of the Office of Public Sector Ethics should be engaged pursuant to the Public Service Employment Act.

(i) Functions of the Office of Public Sector Ethics

The Office of Public Sector Ethics, under an Ethics Counsellor, would have four functions:

(1) advisory,

(2) administrative, (including authority to waive),

(3) investigative, and

(4) educational.

(1) Advisory - One of the roles of the Office will be to advise with respect to application and enforcement of the rules of ethical conduct in the public sector.

We see this role as being performed on three main fronts: The Ethics Counsellor would act as an advisor to the Prime Minister, ministers and deputy heads of departments and agencies with respect to the rules and procedures applicable both to those who report to them and, where applicable, those who are appointed by them. First, the Ethics Counsellor would advise the Prime Minister, in respect of ministers, his own exempt staff, Governor-in-Council appointees and parliamentary secretaries. Secondly, the Ethics Counsellor would act as an advisor to ministers with respect to their exempt staff, their assigned parliamentary secretary and the Governor-in-Council appointees who report to them. Thirdly, the Ethics Counsellor would act as an advisor to deputy heads of departments and agencies with respect to public servants and Governor-in-Council appointees who report to them.

In addition to the kinds of advice now offered by the ADRG, we recommend that the Office of Public Sector Ethics be consulted extensively in the formulation of the procedures to minimize conflicts of interest at all levels, including the supplemental rules of departments, agencies and Crown corporations, so as to ensure simplicity and fairness throughout the public sector.

While such advice might be given informally on occasion, written requests would likely be received by the Ethics Counsellor from these three sources requesting an interpretation of certain principles or procedures. Where interpretations emanate from a single source, a common body of "jurisprudence" or interpretation would be developed and would apply throughout the federal public service.

With respect to the public service, a deputy head of a department or agency could, at any time, consult the Ethics Counsellor on matters of ethical conduct. Because the deputy head has delegated authority to deal with conflict of interest matters and their resolution, he or she would not be obliged to accept the advice of the Ethics Counsellor just as he or she is not now obliged to accept the advice of the Treasury Board on such matters.

The existence and the role of the Office of Public Sector Ethics would not create an extra step in the present system. The new Office would become the central repository of knowledge, expertise and experience in its area of responsibility and would be turned to for advice by the Prime Minister, ministers, deputy ministers and heads of government agencies and Crown corporations on ethics-related matters.

(2) Administrative - Closely related to its advisory function would be its administrative functions. Like the ADRG, the Office of Public Sector Ethics would administer the procedures, i.e. it would assure that they are followed by those to whom they apply and would offer appropriate guidance. The Ethics Counsellor would stand ready, as the ADRG does now, to act as trustee of frozen and retention trusts.

One of the serious weaknesses of the present guidelines lies in the absence of a de minimis rule to ensure that common sense can be applied when dealing with minor conflicts of interest of public office holders, and the absence of a way to give former office holders an opportunity to prove that their post-employment activities do not offend the spirit, even though they may seem contrary to the letter of the rules. If our proposals to remedy this weakness are accepted, the Ethics Counsellor should be given the necessary authority to implement them.

With respect to the declaration or filing of trusts to be established and administered, and assistance for those assuming public office in their endeavour to comply with the disclosure and divestiture rules, the Office of Public Sector Ethics would continue to perform administrative functions currently done by the Assistant Deputy Registrar General's Office.

(3) Investigative - In certain cases, it would be in the public interest to have the Ethics Counsellor investigate allegations that the Code of Ethical Conduct has been breached, or the procedures for minimizing conflict of interest have not been followed. We recommend, therefore, that investigative powers be given to the Ethics Counsellor to be exercised at the request of the Prime Minister, minister or head of department or agency, as the case may be. The Ethics Counsellor would not be empowered with investigative powers on his or her own initiative.

A basic problem with the present arrangements is the absence of a process whereby allegations of conflict of interest can be investigated properly and the situation brought to a definitive conclusion. This is a contributing factor to public cynicism about ethical conduct in government. If matters, once raised as allegations, are never conclusively dealt with, the general public interest is not served and individuals about whom

allegations were made may not find that they were fairly dealt with or satisfactorily acquitted, as the case may be.

Consider for example the case of allegations that could be made against a particular Cabinet minister in relation to ethical conduct or specifically relating to a conflict of interest. In some instances, these may be allegations arising out of the heat of partisan debate, without any real foundation. In other instances, there may be significant evidence of impropriety or wrongdoing. It will rest with the Prime Minister, as it always has, to decide when to take such matters seriously. In those cases where there seems to be cause for genuine concern, the Prime Minister could refer the matter to the Ethics Counsellor for investigation, thus placing the matter in an appropriate forum for thorough review, and giving all interested parties an opportunity to be heard as the Ethics Counsellor proceeds with an investigation.

We do not suggest that the present watchdog roles of the opposition parties in Parliament and the media should be changed. The only thing proposed is the addition of a new element whereby, in those cases where the allegations clearly warrant an investigation, (not a criminal investigation which is the responsibility of the RCMP), the option be available to the authorities to have the Ethics Counsellor look into the matter and make a full report.

A Cabinet minister could refer a matter to the Ethics Counsellor for investigation when his or her parliamentary secretary, a ministerial appointee or a member of his or her exempt staff violates, or appears to violate, the code of ethical conduct, or fails to follow procedures to minimize conflicts of interest. All of the considerations and procedures outlined above with respect to investigations initiated by the Prime Minister with respect to ministers would apply in the case of a minister requesting an investigation of a member of his or her staff.

When investigations are initiated in respect of a member of the public service, somewhat different considerations apply. First, we recommend that primary responsibility for enforcement and administration of the code of ethical conduct within a department or agency of government continue to rest with the deputy minister or head of the agency under delegated authority from the Treasury Board. All of our recommendations with respect to ethical conduct can be fitted into this existing context. As at present, the decision to investigate any matter involving ethical conduct of an employee will be made in the department or agency concerned. If the matter is so serious as to warrant police investigation, this would be carried out in exactly the same fashion as it is at present. The only difference is that for

matters relating to ethical conduct rather than criminal behaviour which a deputy minister or head of an agency wishes to have investigated on a somewhat more arm's length basis, the deputy minister or head of agency should be able to turn to the Ethics Counsellor.

We have already discussed how the Prime Minister, ministers, and deputy ministers and heads of agencies can initiate an investigation by the Ethics Counsellor. The further question is whether the Ethics Counsellor on his or her own should have the authority to initiate inquiries into allegations. It would not seem appropriate for the Ethics Counsellor to investigate alleged conflicts of elected officials of his or her own accord. In the case of public servants, the case of an alleged conflict might best be referred to the deputy head concerned for his or her decision on how to proceed.

Some examples of investigative roles of other bodies are worth considering in this context. In the Department of National Defence, when an accident or any other situation requires investigation, a special board of inquiry is convened. The National Defence Act gives certain persons within the department the authority to convene such boards whenever necessary. Individuals are chosen to serve in this capacity based on the type of knowledge, skills, rank and disinterestedness necessary to conduct the investigation. For every board of inquiry that is convened, the members are hand-picked by the convening authority.

We also note the interesting parallel with the Canadian Judicial Council. In addition to conducting inquiries or investigations at the request of the Attorney General of Canada or a provincial Attorney General, the Judicial Council may, as authorized by the Judges Act, institute its own investigations into allegations of misconduct by judges. It might be argued that, in the same way, the Ethics Counsellor should have such a power.

However, the scope of investigations by the Judicial Council is limited in that the group potentially subject to such investigations is relatively small. That is not the case with respect to public office holders, and to open up a broad right for the Ethics Counsellor to investigate any allegation raised by anyone with respect to an individual or matter in the public service of Canada is too sweeping a proposal, at least at this stage. It may be that after some years of experience and operation of the Office of Public Sector Ethics, this power could be added to those granted to the Ethics Counsellor.

Our terms of reference requiring us to make recommendations consistent with the traditions of Canadian parliamentary democracy also led to this conclusion. We believe

that it would not be in keeping with the tradition of responsible government to have those directly accountable for the actions of the departments of government subject to "outside" investigations instigated for whatever reason. Nor are we unmindful of the fact there are already in place law enforcement procedures to deal with any incidents of individuals breaking the law, and that such matters would continue to be dealt with in the future as they have been in the past.

Still another point to consider is the little known fact that the Canadian Judicial Council under section 42 of the Judges Act is empowered to make investigations of allegations involving conduct of individuals appointed "to serve at pleasure" pursuant to any Act of Parliament. This avenue of investigation (discussed at greater length in Chapter 16 in the section dealing with "Rules Governing Judges and Quasi-Judicial Bodies") currently exists in law and must be recognized as part of the resources available to the government in dealing with matters requiring investigation.

(4) Educational - One of the reasons we have stressed the need to simplify the rules which govern ethical conduct is to make them easier to understand. Tied directly to this is the need for a more effective educational program throughout the federal public service about the rules and their applications.

An atmosphere must exist which stresses the importance of ethical conduct, in order to maintain the appropriate climate within which those working in the public sector act and make decisions. The larger the public service, the more important this becomes. Appropriate to it, therefore, is a general consciousness-raising on the part of all public officials and employees about the nature and application of the rules for ethical conduct and the procedures for minimizing conflicts of interest. Very often this amounts to simple and practical considerations, such as knowing to whom one should turn to discuss a troublesome matter, or how to go about seeking clarification and resolution when one is placed in a compromised position. In this connection, we have been impressed by a number of the methods used by the Office of Government Ethics in Washington to carry out a year-round educational program, involving seminars, publication and distribution of brochures, use of video tapes, and an annual conference for personnel officers or others in each department responsible for matters of ethical conduct.

(j) Access to the Ethics Counsellor

To summarize, the Ethics Counsellor may be approached by:

i) the Prime Minister in respect of any matter and in particular on matters of unethical conduct on the part of any member of his own exempt staff, minister, parliamentary secretary or Governor-in-Council appointee;

ii) ministers in respect of their own private affairs and their exempt staff, assigned parliamentary secretary and those Governor-in-Council or ministerial appointees who report to them;

iii) deputy heads of departments and agencies in respect of their own private affairs and their own departmental or agency staff including any Governor-in-Council appointees; and

iv) the Chief Executive Officers of Crown corporations in respect of their own private affairs and their staff.

It is intended that the Ethics Counsellor will be empowered to investigate alleged conflicts of interests involving ministers, their exempt staff, parliamentary secretaries, Governor-in-Council appointees and public servants. It is considered appropriate, therefore, based on the sensitive and complex nature of the subject, that anyone in any of these categories be permitted to approach the Ethics Counsellor with a problem or a complaint.

The Commissioner of Official Languages accepts complaints directly from individuals (and is required by legislation to do so) without prior channels having been explored.

The Human Rights Commission operates similarly except their legislation requires that any and all other redress mechanisms available to the complainant be exhausted before an investigation is undertaken. Although it might seem desirable for individuals to follow the chain of command, there are some situations when it would not be appropriate to do so. For example,

- an individual may wish to advise the Ethics Counsellor of an existing conflict situation which involves his or her superior, or

- an individual may wish to report a situation but remain anonymous.

Public Service Considerations

Additionally, the question has been raised as to whether individual public servants should have access to the Ethics Counsellor. We believe it would not be appropriate for the Ethics Counsellor to inquire into alleged misconducts involving public servants which have been brought to his or her attention by public servants. Equally important would be the opportunity for public servants to consult the Ethics Counsellor as to whether certain activities are in fact unethical. Consultation could of course take the form of discussion of hypothetical cases. Providing such an opportunity would help to deter unethical conduct by those whose activities might be reported; it would also help to eliminate the "everyone is doing it" justification for unethical behaviour. Nothwithstanding these concerns, it is our view that an overriding consideration is the need to maintain intact the structures and procedures as now developed in departments and in accordance with general principles of Canadian public administration.

Where individual public servants wish to bring matters relating to unethical conduct to the attention of their superiors within the department, there are ways to do so and channels through which to proceed. Therefore, we recommend that individual public servants not have direct access to the Ethics Counsellor.

When a situation of conflict is found to exist, the deputy head has been delegated authority to take disciplinary action. Employees have the right of redress for such action through the grievance system. If an employee grieves, the grievance may be considered at a number of different levels within the department, the final one being the deputy head. If the employee is still not satisfied that the grievance has been appropriately considered (and the grievance relates to a financial penalty, a dismissal or an interpretation of a collective agreement), the case may then be put before the Public Service Staff Relations Board. Ultimately the case could be elevated to the Federal Court and depending on the situation, to the Supreme Court. It should be noted that a decision taken on a grievance at any level in this process can be overturned by the next higher level. It would be most appropriate for this procedure to continue as it has been functioning well for many years.

The ultimate impact on the public service of the Office of Public Sector Ethics would be that an additional body of knowledge could be tapped on an as-required basis for advice and discussion.

(k) Status of the Reports of the Ethics Counsellor

If members of the House of Commons press the Prime

Minister to initiate an investigation of an alleged conflict of interest involving a minister, it is likely that there would be a great demand for the resulting report of the Ethics Counsellor to be made public. Indeed, this would seem appropriate.

In a case involving a public servant, however, no public attention may have been attracted and, therefore, there would be no need to divulge the results publicly. For example, if a deputy head requested that an investigation be conducted in his or her department, then the final report should be made to the deputy head and no one else. Similarly, if a minister requested that an inquiry be made into certain activities of a member of his or her exempt staff, then the final report would be made only to the minister.

The important thing, for the Office of Public Sector Ethics to maintain credibility, is that a report always be made to the person(s) who originally requested it.

We considered carefully whether the Ethics Counsellor's report with respect to a matter involving a Cabinet minister should be made to the Prime Minister, who would have the option of tabling it or not, or whether the Ethics Counsellor's report should be made public by the Ethics Counsellor. We prefer the latter course. Otherwise, the Prime Minister remains part of the problem rather than becoming part of the solution. The idea is to have a clear cut and arm's length procedure for investigating and reporting on serious allegations of unethical conduct and breach of rules of ethical conduct. We do recommend that the Ethics Counsellor make his or her report available to the Prime Minister in advance of making it public (so that the Prime Minister may be in a position to act on the findings in the report on a timely basis) but that the Ethics Counsellor will retain the right, and indeed have the duty, to make public his or her report pertaining to a minister. We are persuaded that this is an acceptable procedure. Nothing obliges a Prime Minister to refer a matter to the Ethics Counsellor for investigation. The Prime Minister himself or herself will decide whether the matter is serious enough for him or her to ask the Ethics Counsellor to investigate, with all the consequences that necessarily follow.

(1) Relationship Between the Office of Public Sector Ethics and the Central Agencies (Treasury Board and the Public Service Commission)

There remains the question of how the advisory function of the Office of Public Sector Ethics would link with the advisory functions of the Treasury Board and the Public Service Commission which are currently in place. These relationships need to be well established and clearly defined at the outset.

The Public Service Commission is currently responsible for two areas relating to ethical conduct. First, they set all policy and give advice on the subject of political activity within the realm of section 32 of the Public Service Employment Act. Since it is proposed that section 32 be removed from that Act and be put under the jurisdiction of the Office of Public Sector Ethics, it would appear that there would be no future requirement for Public Service Commission involvement in this area. Because the role of the advisory committee on post-employment for public servants would be assumed by the Office of Public Sector Ethics, there would be no further need for Public Service Commission involvement here either.

The Treasury Board Secretariat is currently responsible for setting policy and giving advice in the area of conflict of interest and standards of conduct for public servants. Conflict of interest, as a matter of personnel policy, should continue to be administered by the Treasury Board. When there is a breach of the conflict of interest guidelines by a public servant, that individual is subject to disciplinary action, which is also a matter of personnel policy. It would seem reasonable to keep the two together. If such were not the case, it would be necessary for the Office of Public Sector Ethics to provide an advisory and interpretive service to all departments of the public service.

This being the case, there would be two sources of information available to a deputy head who wished to consult on a question of ethical conduct. Clearly the deputy head has the choice to go to one source or the other or to both. It will be necessary for the Ethics Counsellor and the Personnel Policy Branch of Treasury Board to consult closely to ensure that consistent advice and guidance are being given and that the two bodies agree on the standard of ethical conduct that should be maintained in specific cases. There will be considerable contact in the early stages of the establishment of the Office of Public Sector Ethics to formulate understanding of the division of responsibilities and how they intersect.

Although the Treasury Board currently maintains the policy on post-employment for public servants, it has no authority to apply the guidelines to individuals who have left the public service. Those who have left and wish to obtain advice would, under the present system, be advised to approach the advisory committee on post-employment.

Taking into account the responsibilities of the Office of Public Sector Ethics outlined in section (i) of this chapter, and the desirability of maintaining, as far as possible, the present structures and systems for dealing with ethical conduct in the public service, the final division of responsibilities for the various dimensions of ethical conduct would be as follows.

Conflict of Interest

The Office of Public Sector Ethics would be responsible for the establishment of policy as per the Ethics in Government Act; the administration of the policy and any accompanying procedures for ministers, ministers' exempt staff, parliamentary secretaries and Governor-in-Council appointees; and for giving advice to these groups, as well as administration of the policy and any accompanying procedures for public servants insofar as the establishment and maintenance of trusts are concerned.

Treasury Board would continue to be responsible for the administration of the policy and procedures for public servants, including giving advice and guidance to departments.

Post-Employment

The Office of Public Sector Ethics would be responsible for establishing policy as per the Ethics in Government Act; for the administration of the policy and any accompanying procedures for ministers, ministers' exempt staff, parliamentary secretaries, Governor-in-Council appointees and public servants; for giving advice and guidance as requested; and for considering cases for exemption.

The Treasury Board would have no need for involvement in this area other than to ensure that all public servants to whom the post-employment guidelines apply are made aware at the time of appointment of their obligation to abide by them.

Public Comment

The Office of Public Sector Ethics would be responsible for the establishment of policy as per the Ethics in Government Act and for the giving of advice to Governor-in-Council appointees. Because the Treasury Board would have no further role in this subject area, the Ethics Counsellor would provide operational advice to departments on this subject.

Political Activities

The Office of Public Sector Ethics would be responsible for the setting of policy as per the Ethics in Government Act and for the giving of advice and interpretation. Because the Public Service Commission would have no further role in this subject area, the Ethics Counsellor would provide operational advice to departments on this subject.

Deputy heads would continue to apply and enforce the government's policies in their departments and agencies for conflict of interest, post-employment and political activities.

(m) Relationship with Crown Corporations

The interaction between the Office of Public Sector Ethics and Crown corporations is discussed in Chapter 17.

(n) Annual Reports

In order to give Parliament an opportunity to discuss the work of the Ethics Counsellor and his or her Office, it is recommended that like other agencies of government the Ethics Counsellor prepare an annual report which the Prime Minister would place before Parliament. We also recommend that the Prime Minister, at the same time, report to Parliament any action taken or any penalties imposed with respect to failure on the part of public office holders to observe the rules of conduct or the procedures, or any charges laid against public office holders under the Criminal Code or other statutes.

CHAPTER 14

RULES TO GOVERN THE POST-EMPLOYMENT PERIOD

(a) Introduction

We have had no hesitation in recognizing the necessity and desirability of requiring incumbent public office holders to observe principles of conduct and procedures designed to minimize conflicts of interest. We have struggled long and hard, however, over the question as to what, if anything, should be done or can be done to restrict the activities of former office holders.

It is significant that nearly all the representations made to us in writing and at interviews included reference to the post-employment question, and almost without exception they were critical of the existing guidelines.

We note in this context that in the United States, prior to passage in 1978 of the Ethics in Government Act, very little information was available as to the effects of post-employment restrictions on the recruitment and retention of government personnel. "It has been argued, not without merit," notes one U.S. writer on this subject, "that in the absence of such data, it is impossible to analyse the costs and benefits of the laws in anything other than general terms."[1]

A similar observation could well be made in the Canadian context, with respect to application of the Conflict of Interest Guidelines during the past decade. To gather information on the guidelines' effect on post-employment and recruitment matters, we discussed application of the guidelines with government officials in the Privy Council Office responsible for their administration. Written and oral submissions were received from many individuals subject to these post-employment guidelines. We reviewed the implications of the present policy with several prospective public office holders who are currently assessing the guidelines in relation to a possible move into the public sector, and gathered statistical data on such matters as the number and types of trusts which have been established.

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1. Morgan, Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency, 1 Duke L.J. 29 (1980).

We do not consider our research efforts to have been rigorously scientific, but on the other hand, they have been more than merely impressionistic. In general terms, we conclude the current post-employment guidelines create unnecessary problems in a large enough number of cases to affect adversely the government's ability to recruit able personnel.

(b) The Nature of the Post-Employment Problem

The term "post-employment" refers to a problem facing government, not the individual, although it is true that any improper or unethical conduct in this area relates directly to things which an individual may do. The reason it is primarily a problem for government is because "post-employment" refers, not to the fact that the public office holder has now retired, but relates rather to an office holder moving out of government into the private sector, and continuing to be actively employed there. There is little real concern about "post-employment" when the individual simply retires, or moves to a provincial or other level of government to work, returns to the federal government in some other capacity, or perhaps takes up a teaching position at a university. The only difficulties that might arise in these cases would be in situations where the individual makes investments based on confidential information not available to others or proceeds to otherwise use information, such as in writing or teaching, for remuneration and the information being conveyed is of a confidential nature.

The principal concerns, as we understand them, which justify placing restrictions on the activities of public office holders when they leave office are that: (1) public office holders while still in government may have used their offices to advance their prospects for private employment when they leave office; (2) former public office holders may have privileged access to those still in government; (3) former public office holders may receive preferred treatment in their dealings with government; and (4) private employers may obtain competitive advantages because of special knowledge, use of confidential information, or presumed influence with the government when they employ or appoint former public office holders as directors or officers.

Our view is that, upon departing from government, an individual takes two kinds of information: first, information which is general knowledge of the structure, nature, operations and personalities of government, in short, information about how government works; and second, privileged and confidential information about pending policy, facts not yet generally disclosed to the public, and inside and sensitive information about private sector entities which the government regulates. In our opinion (and in the opinion of many with whom we spoke)

transmission of the first type of information to the private sector is clearly in the public interest. It is the second type of information which requires protection, and, therefore, it is appropriate to have rules to govern those who possess it.

(c) The Basic Principle and its Functional Application

In the Code of Ethical Conduct, principle ten states that: "Public office holders have a duty not to act, after they leave office, in such a manner as to cast doubt on the probity and impartiality of the governmental process or in any other way to diminish public confidence in the integrity of government."

In the Procedural Rules to Minimize Conflicts of Interest, to be enacted as regulations under the Ethics in Government Act, we recommend that detailed provisions be developed to give former public office holders and incumbent public office holders guidance in interpreting and applying this principle. In Chapter 3, we concluded our introductory discussion of post-employment by stating that: "Within certain narrow and stipulated limits of time and degree of connection with their former responsibilities, former public office holders should otherwise be free to assist private entities or persons in their dealings with government." In our view, the Procedural Rules to Minimize Conflicts of Interest should specify those limits of time and degree of connection, in much the same way that the current post-employment guidelines endeavour to do. Before making recommendations as to these "stipulated limits", we wish to make some general observations about guiding principles or rules-of-thumb in this difficult area of "post-employment".

Six basic points or concepts need to be taken into account in developing procedural rules to apply principle 10 in the Code of Ethical Conduct.

First, the best time to deal with conflicts of interest arising out of post-employment is before the public office holder leaves office when preventive steps of an anticipatory nature can be taken (such as having the public office holder agree to restrict his or her post-employment activities in certain ways following government employment).

Second, rules about dealings between the government and former office holders can, generally speaking, be more effectively enforced against present public office holders who can be held directly accountable and disciplined, than against former public office holders. Under the present rules, at least, there is no easy way of directly disciplining former public office holders. Another problem, which is the other side of this coin, is that under the present arrangements, former public office holders accused of breaching the guidelines cannot readily defend

themselves against allegations of misconduct, except through the media, which is not necessarily the most appropriate forum for this purpose.

Third, any "cooling-off" period after leaving public office and entering private employment should be related to the particular circumstances of one's position while in government, and should not impose unnecessary hardship on former public office holders, be they elected or appointed. In short, the more that the rules in this area can be particularized, or drawn with specific concerns or problems in mind, the less likely they will be to produce unfair results than would highly generalized rules of broad application.

Fourth, interchange of personnel between government and the private sector, in both directions, should be encouraged so that government can take advantage of business experience and the private sector can operate with a better understanding of the workings of government. However, measures must be taken to ensure that the prospect of private employment does not affect the decisions of public office holders, and that particular businesses do not gain an unfair advantage over their competitors by employing former public office holders who possess and are prepared to disclose up-to-date information about those competitors.

Fifth, authority should be available to permit former public office holders to take employment in those cases where, on the basis of an application for a waiver or modification of the "cooling-off" period, a senior officer with authority (such as the Ethics Counsellor), can be satisfied that no conflict of interest would exist.

Sixth, rules which proscribe post-employment activities should be drawn up with much greater specificity, to enable those who leave government to have a clear idea of what they can, and cannot, do. This is valuable not only to the former public office holder but also to his or her new private sector employer and to those in government with whom the former official might deal.

The first of these six considerations -- namely, making an agreement to govern post-employment relationships before the official departs from government -- can be brought to bear more readily on appointed officials than on Cabinet ministers. Ministers do not have much control over their future. They do not know how long they will be in office. They may be asked to resign by the Prime Minister or they may be defeated in an election.

Ministers seldom resign voluntarily to take outside employment. Their motives for resignation are likely to be mixed and may include some dissatisfaction with the policies of the

government. The Prime Minister can ask that ministers discuss with him or her their post-employment plans but this the minister may be reluctant to do when the time comes for submitting his or her resignation. Rules of procedure along this line (such as those contained in the current Guidelines applicable to ministers) are therefore of doubtful value.

As far as appointed public office holders are concerned, they can be asked to inform their minister or deputy minister that they have received an offer of outside employment and seek approval to accept it. If approval is withheld, they may still resign and accept the offered position, and nothing can be done to prevent this. In most cases, however, if they are seeking to do well with their new employer they are not likely to risk official criticism and ostracism. Those who do defy the advice of their superiors may also be people whom the government would not wish to retain in positions of senior responsibility in any event.

This brings us to the second consideration mentioned above, namely, that it is easier to enforce rules pertaining to post-employment against public office holders who are still in official positions (and who may find themselves dealing with a former official) than against those who have departed the scene. Once again, it is useful to point to the differences between the positions of former ministers and former appointed public office holders. The ability of a former minister to influence government decisions to his or her advantage depends upon which party is then in office. If his or her party is still in office, the presumption is that he or she will receive friendly attention, particularly from his or her successor in the portfolio. If the party has been defeated, he or she is not likely to receive preferred treatment and continuing officials are likely to be very circumspect in their dealings with him or her. Former appointed public office holders, in a non-politicized public service, on the other hand, can maintain their contacts and friendships regardless of the political party in power.

The question of responsibility for breaches of the rules regarding contacts between former office holders and the government is crucial. In some ways it may be quite unfair to place the primary responsibility upon the former public office holder. He or she is bound to be at a disadvantage when allegations are made about the impropriety of his or her contacts with the government. Every contact made, however innocent, becomes suspect and he or she cannot defend himself or herself when charges are made in the House of Commons. The minister can answer for himself or herself and his or her officials. If preferred treatment or any other impropriety can be shown, the former minister as well as the current holder of the portfolio will, of course, both suffer in public esteem, which is quite

proper and perhaps one of the most effective sanctions to prevent this happening in the first place.

The rules pertaining to post-employment activities should not, however, be drawn up in such a way that the onus is on the former minister to prove that he or she did not break them. We believe that former Cabinet ministers in Canada are entitled to the benefit of the doubt in terms of questions of ethical conduct. To put it any other way is an invidious basis on which to establish public policy.

Whatever rules or guidelines about post-employment apply to former ministers and appointed public office holders will be those which, while still in office, they promised to observe (as in the case of oaths of office and any instruments in writing they may have signed) or which were made binding upon them (as, we propose, the Code of Ethical Conduct would be). If such rules are changed after these office holders leave office, there is an obvious presumption that those new rules would not retroactively apply to them. This in itself is a reason to reconsider this particular aspect of post-employment rules or guidelines.

The purpose of a "cooling-off" period for former office holders who take private employment is therefore twofold: first, to minimize the conflict of interest which could arise when an office holder is offered outside employment, and, second, to minimize the advantage to the prospective employer of gaining an employee who has information and influence -- as distinct from expertise -- which gives the employer a competitive advantage in the marketplace.

The minister who has left office involuntarily should not be subject to unnecessary restrictions on his or her ability to find employment. This is manifestly unfair to the former minister and, we believe, is a factor which can discourage people from entering public life. There is something to be said for the idea that he or she should not move immediately into a business which he or she supervised or with which he or she had recent dealings while in office. This gives politics a bad name. On the other hand, this is often the business in which, because of his or her ministerial experience, the former minister is most expert. Consider, for example, the case of the person who is likely to be Minister of Industry, Trade and Commerce. Ideally, this will be an entrepreneur with considerable experience in business and industry. When that person ceases to be minister and returns to make a living as an entrepreneur, it is inconceivable that he or she could set up a new business, or likely even operate an existing one, without having in the process to deal with his or her former department, given its extensive role in grants, subsidies, export assistance, regulation and other facets of government's present-day interface with industry. Under the

current Guidelines for Ministers, such a minister would have a problem -- but he or she would have an even greater real-world problem trying to make a living in some other unrelated activity. It is not for him or her to become a university lecturer, nor is it in the country's interest to sideline its entrepreneurial talent.

A decent interval is as much in the interest of the former minister as it is in the public interest. Yet in this fast-moving world, two years is both unnecessarily long and manifestly unfair to the minister who was forced out of office. Even one year is a long time. It must be borne in mind too that if a former minister chooses to ignore any rule or guideline it may be difficult to devise an appropriate sanction, which must be considered in trying to devise a workable public policy.

Those appointed public office holders who voluntarily leave to take outside employment are in a different position from ministers, but even in those cases, the "cooling-off" period should not be excessive and if there is a serious problem which concerns the government, it would be fairer to the official and more effective from the point of view of the public interest to give the official a paid vacation before taking up his or her new employment. This approach has been used occasionally in the past. If the government believes it has an interest to protect, and wants to do that by imposing a hiatus before the official can take up new work in the private sector, then we believe the government should be prepared to pay for that. Administratively, this can be accomplished by keeping the public office holder on the government payroll but out of the office (or working on assignments completely unrelated to the pending private sector position) for the several months judged to be sufficient for cooling off prior to taking up the new position outside the government.

We note, not without some irony, that when the government recruits someone from the private sector, it hires the best person available and expects that individual to start work right away, with no "cooling-off" period, even (and especially) if he or she is coming from a part of the private sector where detailed and up-to-the-minute information is a key qualification for the position in question.

In any event, the "cooling-off" period should be required only in very carefully defined circumstances. As expressed in the fourth consideration which we listed above, there should be as few restrictions as possible on exchange of personnel between government and the private sector.

To summarize our concerns, we feel that public policy in this area of post-employment involves several ideas: in some

situations it is important to effectively prohibit "switching sides"; in other cases it is necessary to protect against use of influence derived from personal friendship or past association; in still other cases there must be some barrier against unfair use of inside information acquired while in government.

As we have already indicated, we feel fundamental distinctions must be made between ministers and appointed public office holders when devising post-employment rules. In Chapter 9 of this report, we discussed the error that we feel was made when, for reasons of logical symmetry rather than practical common-sense, the post-employment guidelines which had been developed for public servants were extended to Cabinet ministers, without recognizing the essential differences between these two groups of officials. For those reasons, we believe it would be a mistake, in the course of any major reformulation of federal conflict of interest policy and procedures, to continue that mistake into the new régime. As noted earlier, such post-employment restrictions are not imposed on Cabinet ministers in most other jurisdictions, and we see no compelling reasons from the Canadian experience why public policy at the federal level in Canada should depart significantly from this norm. We were, indeed, tempted at one stage of our deliberations to follow the example of Britain, Australia and nine of the ten provinces by recommending that any restrictions on ministers' activities after they leave office should be dropped altogether.

Nevertheless, there is something to be said for placing some restrictions on the activities of former office holders for a reasonable period of time if these restrictions can be enforced. The purpose of our recommendations is to enhance public confidence in government. It does not enhance confidence in government for former officials or ministers to be seen, immediately after leaving office, to be lobbying their successors or former colleagues, to be accepting employment or directorships with companies that had been regulated by them or had received contracts or subsidies from their departments, or to be switching sides in any matter in which they had substantial involvement on behalf of the government.

(d) Recommendations Regarding Post-Employment

In the Procedural Rules to Minimize Conflicts of Interest enacted in the form of regulations pursuant to the proposed Ethics in Government Act, in supplemental codes of departments, agencies and Crown corporations, and in the amendments to the governing Acts of quasi-judicial bodies, the provisions discussed in the following pages could be set down to deal with post-employment matters. These include: (1) acceptance of directorships, offices and employment by former public office holders; (2) making of representations by former public office

holders; (3) use of confidential information; (4) switching sides; (5) application for waiver or modification of the rules in certain cases; (6) termination of present advisory committees; (7) post-employment provisions in contracts where appropriate; (8) exemptions for scientific and technical information; (9) exemption for testifying under oath and (10) advising superiors of post-employment plans.

(i) Acceptance of Directorships and Employment By Former Public Office Holders

We recommend that the restrictions should be as few and narrowly defined as possible.

Ministers. For ministers, we think there is a good case for following the practice in other countries with parliamentary forms of government and having no rules other than those in the proposed Code of Ethical Conduct which lays a duty on former public office holders to avoid actions that could cast doubt on the probity and impartiality of the governmental process or that in any other way could diminish the integrity of government.

If, however, the government feels that some specific procedural rule is desirable, the cooling-off period for former ministers should be, in our view, no more than six months for acceptance of directorships, office or employment with a company or organization with which, during the year immediately preceding the minister's departure from office, the department or departments for which he or she was responsible had a special relationship. (We recommend, in this context, carrying forward essentially the same definition of 'special relationship' as found in the current guidelines and changing only the reference to "corporation" to "company or organization". Thus "special relationship" means regulation of the company or organization by the department or agency, receipt by the company or organization of subsidies, loans or other capital assistance from the department or agency, and contractual relationships between the company or organization and the department or agency.) Otherwise there should be no restrictions.

Parliamentary Secretaries. For parliamentary secretaries, the same six-month rule should apply.

Ministers' Exempt Staff. For a minister's exempt staff, the same six-month rule should apply, unless the minister provides otherwise by indicating which members of his or her exempt staff are to be made subject to the post-employment rules for non-elected public office holders.

Non-Elected Public Office Holders. For non-elected public office holders, who generally have better control over their futures than ministers, we recommend they be subject to a somewhat longer cooling-off period so as to avoid the impression that they had, during their time in office, been planning to take employment with a company or organization that had had a special relationship with their department. Therefore, for deputy ministers, and other full-time Governor-in-Council appointees (other than judges, members of quasi-judicial bodies, and personnel of Crown corporations all of whom are, or are to be, subject to other rules) and for all other public office holders, we recommend that for one year there be no acceptance of an office, directorship, or employment with any company or organization with which, during the one year immediately preceding their departure from office, their department or agency had a special relationship.

These six-month and twelve-month rules could in some instances result in unnecessary and pointless restrictions on former public office holders, both elected and non-elected, seeking employment in the private sector. We therefore recommend that a former public office holder have the right to apply to the Ethics Counsellor for a reduction or a waiver of the cooling-off period where it would be manifestly unfair and where no breach of the Code of Ethical Conduct would be involved, according to a procedure we describe in section (v) that follows.

(ii) Representations by Former Office Holders

In many respects the most troublesome of the possible restrictions are any that might be imposed on dealings between former public office holders and the government. The present guidelines prohibit for a specified period the activity referred to as "lobbying", a word that is the subject of differing interpretations and should in our view be avoided in the future. Any other word to describe dealings between private interests and government, however, has its own difficulties. In the end, we chose the word "representations", which is more general and avoids the pejorative connotations that are sometimes attached to "lobbying".

We believe that the only effective means of dealing with this problem of representations made to government is to lay the responsibility on current office holders to avoid giving preferential treatment to former public office holders. Under the proposed Code of Ethical Conduct, an onus is thus placed on all incumbent public office holders to be mindful of their duty under the Code and under such procedural rules regarding post-employment as may be specifically developed, to act in all dealings with former public office holders so as never to compromise their own position or that of their department, board, agency or Crown

corporation. The fact that a former public office holder makes representations to the department of which he had been minister or deputy minister or to any other public office holder is not per se abhorrent. What matters is whether he or she receives treatment more favourable than might be accorded to anyone else in similar circumstances.

Again our disposition is to avoid suggesting rules that cannot readily be interpreted or enforced, if only because they create cynicism about the whole structure of the rules of ethical conduct. We prefer to rely on the general principles of the proposed Code of Ethical Conduct. The government of the day, however, may not be prepared to leave the matter on this basis. If the government does wish to go further and stipulate the cooling-off period for the making of representations by former office holders, ministers or other public office holders, to the department in which they had served in their last year in office, we recommend that it should not exceed one year.

Specifically, such a rule could be stated as follows: a former public office holder shall not, during the period of one year from the date on which he or she ceases to hold public office, make representations of any kind to any department (or any board, agency or Crown corporation under that department) for which he or she was responsible or by which he or she was employed during the one year immediately preceding his or her departure from public office, on behalf of himself or herself or any other person or group of persons who stand to benefit directly or indirectly from such representations, where the former public office holder receives or may receive any financial consideration or other tangible benefit, direct or indirect, in respect of making such representations.

In the case of a former minister or former parliamentary secretary who continues to hold office as a member of Parliament after departing from the office of minister or parliamentary secretary, those provisions of the Senate and the House of Commons Act which govern representations and conflicts of interest by parliamentarians would of course continue to apply, in addition to the foregoing one-year rule.

We recommend that this one-year rule be the same for all employees in the public sector -- ministers, parliamentary secretaries, ministers' exempt staff, deputy ministers, and other full-time Governor-in-Council appointees (except judges and members of quasi-judicial bodies, whom we envisage being governed by separate rules) members of the public service, and personnel of Crown corporations. Where considered appropriate, more stringent rules could be developed in supplemental codes of conduct.

(iii) Confidential Information

We recommend that the various oaths of office taken by those who assume public offices be reviewed to add or clarify wording to carry out the intent of protecting the integrity of government and preserving the confidentiality of sensitive information in the post-employment period.

(iv) Switching Sides

We recommend continuation of a rule which prevents any non-elected former public office holder when he or she enters the private sector from switching sides with respect to a specific matter in which he or she was personally involved on the government side, or which was under his or her authority as a public office holder. This prohibition against switching sides would apply not only to the former office holder who enters the private sector, but also to one who goes to work for another government. The present post-employment guidelines impose a time limit on this rule against switching sides (i.e. two years for ministers). Given that we are dealing here with specific matters, we see no reason to put any time limit on the prohibition. In short, it should be forever. A lawyer cannot switch sides at any time as an advocate on a specific case, and that is parallel to what we are dealing with here: someone in the public sector who is substantially involved in a specific proceeding, transaction, case or other matter to which the Government of Canada is a party. This substantial involvement can mean either one's personal involvement in the matter, or one's official responsibility for it, or both.

Such a rule against switching sides would not be appropriate for elected public office holders, however, since ministers and parliamentary secretaries, given their high public identification with a particular matter, could not "switch sides" after entering the private sector without risking publicity which would affect adversely their own credibility and the particular matter on which they would be acting for pay.

In rare cases, this general rule may not in fact work to the public interest. In such instances, application could be made to the Ethics Counsellor for a ruling under the procedure to waive or modify a post-employment restriction, as described in section (v) following.

(v) Application to Waive or Modify Post-Employment Rules in Particular Cases

We discussed above the difficulty in laying down hard and fast rules of general application which do not impose unnecessary and burdensome restrictions on some former public office holders. We believe that, whatever the length of the "cooling-off" period, the former public office holder should be granted the right to seek a ruling from the Ethics Counsellor that there is no reason in public policy to delay, for example, the implementation of his or her private employment plans.

There are instances where the application of the six-month or one-year post-employment rule, or the switching-sides rule, would have an inappropriate result or would not be in the public interest. In humanitarian cases, and where no breach of the Code of Ethical Conduct would be involved, we recommend that the former public office holder be able to make written application to the Ethics Counsellor, setting forth the reasons why and to what extent he or she believes the rule should be waived in the particular instance. We further recommend that in ruling on the application, the Ethics Counsellor must give written reasons for his or her decision, must state clearly the extent (if any) to which the rule is being modified or waived, render the decision promptly, and forthwith make public the decision and place a copy of same in a public registry maintained in the Office of Public Sector Ethics.

In our view, the Prime Minister, on his own initiative, would have the right to make such a written request for a waiver or modification on behalf of a former minister, former parliamentary secretary, or any other former public office holder, The results of any ruling so requested by the Prime Minister would also have to be made public by the Ethics Counsellor.

Such applications must be made in advance, and not after a post-employment rule is breached.

(vi) Termination of Present Advisory Committees

The foregoing arrangements, which contemplate a role for the Ethics Counsellor in the application of post-employment rules in specific cases, would, we recommend, replace the Advisory Committee of Ministers (which can at present exempt a former minister from the present post-employment guidelines), the Public Servants Advisory Committee, and the Governor-in-Council Appointees and Exempt Staff Advisory Committee (which each have similar powers of exemption with respect to public servants, and Governor-in-Council and exempt staff appointees, respectively).

(vii) Post-Employment Provisions in Contracts where Appropriate

We recommend that, in those cases where any form of written contract is entered into between the Crown in Right of Canada and an individual in connection with assuming or holding a public office under the Crown, the binding effect of the Code of Ethical Conduct be expressly acknowledged, and further rules governing post-employment activities applicable to that individual be expressly agreed to.

In contrast to the present guidelines, such a contract would represent a personal commitment and could, if properly entered into so as to be legally binding in the post-employment period, be enforced.

(viii) Exemptions for Scientific and Technical Information

We recommend that in the Procedural Rules to Minimize Conflicts of Interest and the supplemental codes an exemption to the foregoing post-employment prohibitions be made for scientific and technical information, where communication between the former public office holder and his or her former department, board, agency or Crown corporation is solely for the purpose of furnishing or obtaining scientific or technical information pursuant to established government procedures.

This exemption will allow the free exchange of such information, regardless of a former public office holder's prior participation in or responsibility for the matter. This would permit, for example, a former public office holder working on a project to make contact with the government to determine the kind and form of information required, or the adequacy of information already supplied, so long as government procedures are satisfied. In our view, the primary responsibility for developing procedures to guide activity under this exemption should be with each department, board, agency or Crown corporation, so that such procedures are appropriate to the particular characteristics of the programs and needs of each. Such procedures could be reviewed periodically by the Ethics Counsellor. These procedures would be incorporated in the supplemental code of the particular administrative unit involved.

In promulgating such procedural rules, the government department, agency, board or Crown corporation may take into consideration such matters as: limiting communications to those formats which are least conducive to the use of personal influence; segregating, to the extent possible, meetings and presentations involving matters of technical substance from those involving other aspects of the relationship; requiring that the

official in the department, board, agency or Crown corporation responsible for administration of ethical conduct rules be informed of instances where the exemption is used; or employing more restrictive practices in circumstances involving either immediate competition for contracts or applications for grants than in those involving an on-going project.

(ix) Exemption for Testifying Under Oath

We dealt above with restrictions on confidential information in the post-employment period. Nothing in these post-employment rules should be construed, however, to prevent a former public office holder from testifying before any court, board, commission or legislative body with respect to matters of fact within the personal knowledge of the former public office holder.

We therefore recommend that a provision be included in the Ethics in Government Act, to the following effect:

> "Nothing in the Code of Ethical Conduct or any rules made pursuant to this Act shall prevent a former public office holder from making statements required to be made under penalty of perjury."

This provision would not, however, allow a former public office holder, otherwise prohibited from using confidential information in the post-employment period, to testify on behalf of another as an expert witness except: (1) to the extent that the former public office holder may testify from personal knowledge as to occurrences relevant to the issues in the proceeding, including those in which the former public office holder participated; or (2) in any proceeding where it is determined that another expert in the field cannot practically be obtained.

(x) Advising Superiors of Post-Employment Plans

The current guidelines state that office holders must disclose to their superiors any offers of employment that could conflict with their official duties, any offers under serious consideration from private sector organizations with which he or she has had official dealings, and any offers that have been actually accepted. We recommend that this disclosure rule continue to apply to all non-elected public office holders, and be incorporated in the Procedural Rules to Minimize Conflicts of Interest.

For the reasons given above, we see no point in retaining rules requiring ministers to consult with the Prime Minister about their post-employment plans. They are, of course, always free to do so if they wish.

CHAPTER 15

RULES TO GOVERN POLITICAL ACTIVITY AND PUBLIC COMMENT BY NON-ELECTED PUBLIC OFFICE HOLDERS

(a) Political Activity and Ethical Conduct

"Political activity relates to the ethical conduct of public servants", as Professor Kenneth Kernaghan wrote in 1973: "in that overt support for a political party may prevent or appear to prevent an official from carrying out his duties in an objective manner."[1]

In Chapter 3, the questions of partisan political activity by a non-elected public office holder, and of criticism of government policy and administration by non-elected public office holders were considered. In Chapter 7, the history and development of federal conflict of interest laws and guidelines were reviewed, including provisions relating to partisan political activity. A synopsis of the current provisions, essentially as contained in Section 32 of the Public Service Employment Act, is set forth in Chapter 8, and full text of Section 32 is found in Schedule C of this report. We now wish to make observations and recommendations about political activity in the context of our broader proposals to deal with ethical conduct.

The freedom of public servants to participate in the political process is restricted in a number of ways, such as statutory prohibitions against being candidates for public office, working for political parties, and raising funds for candidates and political parties. The restrictions imposed on public servants today are far fewer than was formerly the case. The

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1. Kenneth Kernaghan, "The Ethical Conduct of Canadian Public Servants," OPTIMUM, 4, No. 3, (1973), p. 13.

literature on this subject covers the historic evolution of these laws, and the rationale for them.[2]

The practical effect of Section 32 of the Public Service Employment Act has been to extend virtually full political rights to roughly 90 per cent of public servants. Under the Act, deputy ministers and heads of agencies are prohibited from engaging in political activity and certain other employees are forbidden to stand as candidates, if, in the judgement of the Public Service Commission, the employee's usefulness to the public service might be impaired by such candidacy.

Implementation of the Act's provisions on political partisanship has not won universal approval because of difficult border-line cases where the Public Service Commission has denied leave of absence to an employee wishing to stand for election. A potentially serious political problem is avoided, however, by the Act's prohibition against senior public servants and other officials in sensitive positions engaging in political activity which might involve them in real or apparent conflicts of loyalty.

It is assumed that political neutrality is good although some politicization of the public service may be unavoidable. Thus, some restrictions on political activity by public servants are appropriate. On balance, we believe the provisions contained in Section 32 strike an acceptable balance between individual freedom and the requirement for a politically neutral public service.

It is recommended, however, that Section 32 be moved from the Public Service Employment Act to the proposed Ethics in Government Act. Parallel to this change would be moving the

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2. See J. Patrick Boyer, The Legal Framework of Elections in Canada (Butterworths, Toronto, 1981), especially Chapter 16, "Freedom to Participate in the Political Process", Section (b) "Political Rights of Civil Servants"; Kenneth Kernaghan "The Political Right and Activities of Canadian Public Servants," in Public Administration in Canada, 2nd ed. (1971), pp. 382-390; Kenneth Kernaghan, "Politics, Policy and Public Servants: Political Neutrality Revisited", Canadian Public Administration, 19, No. 3 (1976), p 433; Hon. Mitchell Sharp "Neutral Superservants," Policy Options, November/December 1982; and Edgar Gallant, "The Public Servant-A Relevant Canadian", an address to the Institute of Public Affairs, Halifax, October 1983.

responsibility for administering the provisions of Section 32 from the Public Service Commission to the Office of Public Sector Ethics.

It is the present practice that when a public servant wishes to be granted leave to stand for nomination and election for a political party, the Public Service Commission renders a decision as to whether leave will be granted. It is our view that a central body is best situated to make these decisions on the recommendation (which may, of course, not always be accepted) of the deputy minister concerned. We do not feel that the decision as to granting leave should be left solely to deputy ministers in individual departments. We envisage that the "central body" making these decisions will, under the new régime, be the Ethics Counsellor in place of the Public Service Commission. As a result, there will continue to be uniform treatment of such requests across the public service.

It is the Treasury Board rather than the Public Service Commission which rules on requests for leave by a public servant to work in a political capacity (such as in the office of a minister or the office of the Leader of the Opposition) because it is at present the Treasury Board's responsibility as employer, under Sections 5 and 7 of the Financial Administration Act, to deal with such matters. We recommend that the Ethics Counsellor be given responsibility here, too, for deciding requests for such leave.

Suggesting this change should in no way be construed as a reflection upon the Public Service Commission, or upon Treasury Board, which we believe have performed these difficult and sensitive tasks with great skill. However, having political activity issues handled by the Ethics Counsellor is desirable in our view, because it centers in one place all matters relating to ethical conduct. We recognize that political activity can be viewed either as a staffing problem related to efforts to minimize partisan political considerations in appointments and promotions, or as an ethics problem. While both interpretations are legitimate, we believe that the function can be transferred from the Public Service Commission to the Office of Public Sector Ethics without removing the ability of either departments or the Public Service Commission to monitor the merit system and ensure avoidance of political patronage within the public service. On a practical level, we envisage there would be a close working relationship between the Ethics Counsellor and the Public Service Commission in this field.

In transferring Section 32 to the Ethics in Government Act, an opportunity may also be presented to remove some of the uncertainties created by the present wording of the section. Those branches of government which have had involvement or

responsibility with this subject (such as the Public Service Commission, Treasury Board, the Public Service Staff Relations Board, and deputy ministers) might make suggestions for clarification or improvements of Section 32, which could be incorporated in the wording of the Ethics in Government Act before it is introduced in Parliament. Any specific recommendations for change would of course have to be based on solid data supporting the need to revise the current wording of Section 32.

(b) Public Comment

Turning to the matter of public comment by non-elected public officials on government policy and administration, we note that there has been no change in the traditional rule that government employees are not to indulge in public criticism of government policy or administration unless they are on leave to seek election. At present, the Public Service Commission, which has the statutory authority to deal with certain types of political activity, has no similar authority to deal with public comment issues. This is an area which comes under the ambit of Treasury Board, and the matter is usually handled within the department concerned.

The area of public comment is likely to be problematic under the Charter of Rights and Freedoms, unless the restrictions in this area are concisely stated. A clear legal provision is needed restricting freedom of expression (otherwise guaranteed by the Charter to all Canadians) in the case of non-elected public office holders in a way that is both reasonable and demonstrably justifiable in a free and democratic society. We recommend for this reason that one of the principles in the Code of Ethical Conduct address the matter of public criticism by non-elected public office holders of government policy and administration. Once the Ethics in Government Act is passed, enacting the Code, such a provision would have the force of law. Wording is suggested which could doubtless be improved through consultations with public service unions and in Parliament.

We believe the role and importance of the Office of Public Sector Ethics will be strengthened by including in its mandate a role for giving advice to deputy ministers and heads of agencies, the Public Service Commission and Treasury Board.

The matters of partisan political activity and public comment by non-elected public office holders are closely related, and indeed a number of the writers on this subject treat the two as essentially the same phenomenon. At present, in the federal government, political activity and public comment are treated separately, but only for the functional reason that political activity is partly governed by Section 32 of the Public Service Employment Act and therefore handled by the Public Service

Commission, while matters of public comment and other partisan activity not covered by Section 32 are dealt with by Treasury Board, or under delegated authority from Treasury Board, by deputy ministers and heads of agencies. While it is extremely hard to distinguish between political activity and public comment in a functional way, the fact that responsibility is now divided between the Public Service Commission and Treasury Board has made it necessary to deal with them separately. The logic of bringing the two matters together under the jurisdiction of the Ethics Counsellor is yet another rationale for creating the Office of Public Sector Ethics. It should lead to a more orderly basis for dealing with public comment and political activity in the public sector.

CHAPTER 16

RULES GOVERNING JUDGES AND QUASI-JUDICIAL BODIES

(a) Introduction

Because judges are appointed by the Governor-in-Council, as are most members of quasi-judicial bodies in the federal government, they come within our terms of reference to consider "full time Governor-in-Council appointees".

However, the importance of federally appointed judges remaining separate from the detailed application of the proposed régime, in order to preserve the independence of the judiciary, is recognized. Although the members of the quasi-judicial bodies are not judges, for our purposes it was accepted that they perform a decision-making role which is adjudicative, and it is important, in terms of public perception, for quasi-judicial bodies to be dealt with in a manner that does not treat them as another department of government.

The recent history of arrangements regarding conduct by judges is reviewed in order to clarify why no change is recommended in the arrangements. In the United States at the federal level, judges were brought into the same régime as other branches of government, in spite of their strong recommendation that this not be done in deference to the concept of judicial independence, and in spite of the existence of a judicial ethics committee handling such matters. The recommendation which we make, after careful deliberation, should not therefore be taken as given.

Recent experience with respect to Canadian judges - in terms of the arrangements which have been made to deal with matters of conduct - is reviewed because of the valuable parallels that can be seen between the role of the Canadian Judicial Council and the proposed Ethics Counsellor.

The more complex situation of the quasi-judicial bodies is examined and recommendations are made as to how our general proposal for a statutory code of ethical conduct, an Office of Public Sector Ethics, and the role of supplemental codes, can be

accommodated to quasi-judicial bodies to achieve the same results but afford them a greater measure of independence.

(b) Role of the Canadian Judicial Council

Section 39 of the Judges Act established the Canadian Judicial Council, consisting of the Chief Justice of Canada, the chief justice, and any senior associate chief justice and associate chief justice, of each superior court or branch or division of such court. Section 45 of the Tax Court of Canada Act (29-30-31-32 Eliz. II 1980-81-82-83, C. 158) amended Section 39 and established membership of the Council as consisting of the senior judge of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories, the chief judge and any associate chief judges of each county court or, where there is no such chief judge or associate chief judge, such judge as is named by the judges of that court to represent the court on the Council and the chief judge advocate and judge of the Tax Court of Canada. The objectives of the Judicial Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior and county courts and in the Tax Court of Canada.

Section 40 of the Judges Act states that the Council must, at the request of the Minister of Justice of Canada or the attorney general of a province, commence an inquiry as to whether a judge of a superior, district or county court, or of the Tax Court of Canada, should be removed from office for any of several reasons, including the following: having been guilty of misconduct; having failed in the due execution of his or her office; or having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of his or her office.

There is, therefore, an established procedure dealing with conduct by a judge which places him or her in a position incompatible with the due execution of his or her office which concern is addressed in this report.

The Canadian Judicial Council is given authority by section 40(2) to investigate any complaint or allegation made in respect of a judge of a superior, district or county court, or of the Tax Court of Canada. For the purpose of conducting an inquiry requested by the Minister of Justice of Canada or a provincial attorney general, or for conducting an investigation on its own initiative, the Canadian Judicial Council may designate one or more of its members who (together with such members, if any, of the Bar of a province, having at least 10 years standing, as may be designated by the Minister of Justice of Canada) shall constitute an inquiry committee.

Inquiry Committee For Judges

The Canadian Judicial Council, or an inquiry committee, in making an inquiry or investigation under section 40, is deemed to be a superior court, and has power to summon before it any person or witness and to require him to give evidence, including the production of documents, and has power to compel witnesses to testify. The Council may prohibit the publication of any information or documents placed before it in connection with or arising out of the investigation under section 40, when it is of the opinion that such publication would not be in the public interest. Such an inquiry may be held in public or in private, unless the Minister of Justice of Canada requires that it be held in public.

A judge in respect of whom an inquiry or investigation is being made under section 40 must be given reasonable notice of the subject matter of the inquiry or investigation, and of the time and place of any hearing. The judge must also be given an opportunity by herself, himself or counsel of being heard, cross-examining witnesses and deducing evidence on his or her own behalf.

After completing its inquiry or investigation under section 40, the Canadian Judicial Council reports its conclusions and submits the record of inquiry or investigation to the Minister of Justice of Canada. If the Council forms the opinion that the judge, in respect of whom the inquiry or investigation has been made, has become incapacitated or disabled from the due execution of his or her office by reason inter alia of misconduct or incompatible conduct, it may recommend that the judge be removed from office and that he or she cease to be paid any further salary. Any order of the Governor-in-Council to remove a judge from office, and all reports and evidence relating to the matter, must be laid before Parliament within 15 days after the order is made, or if Parliament is not then sitting, at any of the first 15 days next thereafter that Parliament is sitting, as stipulated by section 41(7) of the Judges Act.

Inquiry Into Conduct of Other Public Office Holders

It is important to note that section 42 of the Act, empowers the Canadian Judicial Council to make further inquiries. In terms of the review of present arrangements, the availability of section 42 inquiries is considered to be highly relevant and a significant alternative (for certain types of inquiry) to the proposed powers of investigation available on request of the Ethics Counsellor.

At the request of the Minister of Justice of Canada pursuant to section 40, the Council must commence an inquiry as to whether a person appointed pursuant to an act of Parliament to hold office during good behaviour (other than a judge of a superior or county court, or of the Tax Court of Canada, or a person to whom section 19 of the House of Commons Act applies, namely, any clerk, officer, messenger or other person attendant on the House of Commons, if appointed by the Crown) should be removed from office for any of the reasons set out in section 41(2). These include the person being guilty of misconduct, or having been placed, by conduct or otherwise, in a position incompatible with the due execution of his or her office. The procedures regarding inquiries under sections 40 and 41, summarized above, apply also to inquiries under section 42, with such modifications as the circumstances require.

In the case of such an inquiry into a person appointed pursuant to an enactment of Parliament holding office during good behaviour, section 42(3) further provides that the Governor-in-Council may, on the recommendation of the Minister of Justice of Canada, after receipt of the report from the Canadian Judicial Council in relation to the inquiry in connection with a person who may be removed from office by the Governor-in-Council, other than on an address of the Senate or House of Commons or on a joint address, remove the person from office by order. Any such removal order, and all reports and evidence relating to it, must be laid before Parliament within 15 days after the order is made, or when Parliament is next sitting.

Finally, with respect to these powers to inquire and investigate the procedures for removal of a judge or other person appointed pursuant to an enactment of Parliament holding office during good behaviour as provided by sections 40, 41 and 42 of the Judges Act, section 43 clarifies that other powers, rights and duties are not affected. Nothing done under sections 41 and 42 affects any power, right or duty of the House of Commons, the Senate or the Governor-in-Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those three sections.

Under the provisions of section 42 of the Judges Act, therefore, a procedure exists for investigating complaints of conduct that could relate to activities of those in quasi-judicial positions (and certain others), in as much as such public office holders are appointed by the Governor-in-Council pursuant to an enactment and hold office during good behaviour.

(c) Rules Now in Existence to Govern Conduct of Judges

Statutory Rules Governing Conflict of Interest

Section 36 of the Judges Act embodies the principle that judges are to be concerned with judicial duties, and nothing but their judicial duties. Section 36 prohibits a judge from either directly or indirectly being a director or manager of any corporation, company or firm, or in any other manner whatever, for himself or others, engaging in any occupation or business other than his or her judicial duties.

Likewise, section 37 stipulates that no judge is to act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or inquiry or other proceeding. The carefully drawn exceptions to these rules pertain to admiralty judges, judges acting as commissioners or arbitrators or the like in matters referred by Parliament or under the authority of Parliament, or in respect of assessing compensation or damages under the Railway Act or any other public Act.

In Quebec there are also statutory provisions governing situations in which a judge must disqualify himself or herself, as contained in the Quebec Code of Civil Procedure.

A Form of "Supplemental Code"

In addition to the statutory provisions relating to the handling of matters of conduct by judges, something in the line of a "supplemental code" exists, inasmuch as two books for judges have been written at the request of the Canadian Judicial Council: a book for French-speaking judges, published in 1980, Le Livre du Magistrat, written by Gérald Fauteux, and the book for English-speaking judges, entitled A Book for Judges, written by J.O. Wilson.

These books were written as a result of the Canadian Judicial Council's view that a systematic presentation of the legal and ethical problems that confront judges, especially newly-appointed ones, in the administration of the function of the judicial office, would assist them in carrying out their duties. The books suggest solutions for such problems, some solutions being governed by statute, others being in the nature of advice. Both books address the question of conduct appropriate to members of the judiciary.

Unwritten Code Regarding Judicial Conduct

Judges are not involved in the political process or in public administration. Their initial appointment, which results in their complete removal from issues such as those which affect

ministers and public servants, is generally taken as a guarantee of their fitness for an office which carries independence from executive direction. Judges, moreover, do not determine their own agenda or what issues they will take up, or with whom. They are thus in a completely different position from ministers and from the subordinates to ministers who are in public administration. Judges do not administer any department, they are not charged with expenditure of public money or with appointments to offices, or with commercial or other relations with private bodies.

To act judicially means that judges act impartially and disinterestedly. Judges on appointment must disengage themselves from business involvements, whether those involvements be direct or indirect. If they hold shares in a company that is involved in litigation, we understand that they notify the Chief Justice and may themselves decide not to sit, or leave the Chief Justice to pass on the matter. Some judges choose to withdraw from a case, regardless of how small their financial interest. In the province of Quebec, such questions are not left simply to developed practices, as is the case in the common law provinces and the Supreme Court of Canada, but are dealt with in articles 234 and following of the Quebec Code of Civil Procedure.

The question of financial interest in pending litigation is only one minor aspect of the judges' duty of objectivity, which has ramifications that cannot be reflected adequately in detailed conflict of interest guidelines. Particular social and political views, which may be the product of years of private practice or experience have to be put aside by the judge in the discharge of his or her functions. There are other questions which judges have dealt with successfully and with discretion over the years, such as the appearance of a former partner as counsel, the involvement of a former client in litigation, or the involvement of a member of a judge's family. These matters appear generally to have been handled without any difficulty and without the necessity of the judge having to be admonished or forewarned by a written directive.

Given the statutory provisions of the Judges Act, the existence and operation of the Canadian Judicial Council, and the guidance to be found in the two books dealing with matters of conduct, it is our view that judges should not in any way be brought into any conflict of interest system of rules which the government promulgates for public servants, for others who serve inagencies of administration and for ministers of the Crown. The importance of the independence of the judiciary is underlined as is the fact that judges are required to devote themselves exclusively to their judicial duties, and the fact that the Canadian Judicial Council was created for and is empowered to deal with all allegations or even suspicions of judicial misbehaviour or impropriety.

No matter how appropriate guidelines may be for officers in the executive arm of government, it would be particularly difficult to frame a code of specific rules that would serve as a substitute for the traditions and jurisprudence to which judges now turn in cases of difficulty; and any attempt at statutory codification (beyond the general principles enunciated in the proposed Code of Ethical Conduct) would involve a grave danger of substituting new rules for the established principle of natural justice concerning "bias" and "potential bias", by reference to which new problems must continue to be determined in order to maintain standards of justice at the present level.

(d) The Position of Quasi-Judicial Bodies

When you introduced the conflict of interest guidelines in the House of Commons on December 18, 1973, Prime Minister, you addressed the position of quasi-judicial office holders:

> With regard to appointments to judicial or quasi-judicial boards, agencies and tribunals, it is our hope to extend the same general guidelines. There are, however, some legal problems. I have asked that the Minister of Justice (Mr. Lang) review this matter with a view possibly to recommending amendments to existing legislation to bring it into conformity with established standards of conduct.

Although there was therefore an intention at that time to apply some kind of régime to this group, it was subsequently clarified that judges would not be included, and the provisions of the Judges Act, discussed above, would govern the situation. That left quasi-judicial boards, agencies and tribunals.

Some recent history about the difficulties encountered to date in trying to devise appropriate conflict of interest rules for quasi-judicial bodies is fundamental to understand the approach we recommend.

Who Is in the Quasi-Judicial Category?

During the decade following your comments in the Commons, Prime Minister, a number of efforts have been made to devise an appropriate approach to guidelines appropriate for quasi-judicial bodies. Not the least significant problem was that of defining "quasi-judicial" bodies for this purpose.

The distinction between "administrative" decisions and "judicial" and "quasi-judicial" decisions can be seen largely as arising out of the attempt by courts to fashion an appropriate role for themselves in reviewing the actions of administrative

authorities. Courts are conscious of the fact that all decisions cannot be made on the basis of an official evidentiary record, and that some decisions must be made on the basis of policy considerations transcending the individual concerns of people who, in one way or another, are affected by those decisions. They recognize, too, that in the case of decisions of an administrative nature, it is better for courts to exercise restraint and to defer to non-judicial processes envisaged by Parliament. The upshot of this is that many tribunals, agencies and boards in the federal government have come to be characterized as "quasi-judicial".

Two rules of thumb that have been proposed for determining whether a body is quasi-judicial or not are: (1) identify the principal or primary substantive functions which the legislation has called upon that body or office to perform; and (2) decide whether those principal or primary functions require that body or officer to determine, either by rule or by decision, private rights and obligations. On this basis, a list of approximately 36 bodies or officials in the federal government was at one stage drawn up, including, for example, the Atomic Energy Control Board, the Copyright Appeal Board, the Nuclear Damage Claims Commission, the Restrictive Trade Practices Commission, the Canadian Human Rights Commission, and the Tariff Board.

General Observations or Principles in Developing Rules of Conduct

As discussion proceeded within the government as to guidelines for quasi-judicial bodies, it appears that some five observations or principles were considered to be germane in the development of any such rules of conduct. These five points can be summarized as follows:

(1) quasi-judical office holders have long been and are now expected to observe a high degree of independence and impartiality in the discharge of the judicial functions of their offices;

(2) many of the public office holders with whom we are concerned hold office "during good behaviour" under the terms of the applicable statute law, and for this reason there may be some doubt whether guidelines promulgated by the Governor-in-Council governing their conduct could be made legally effective or binding in the absence of legislation by Parliament;

(3) the guidelines to be formulated will only apply to the judicial functions performed by the holders of the offices in question, and, in relation to other

functions, the guidelines applicable to Governor-in-Council appointees and public servants apply now;

(4) to the extent that any rules of law relating to conflict of interest and bias, which now apply to judicial office holders, are extended to quasi-judicial office holders in relation to their judicial functions, avoidance of the strict application of those rules may be possible through disclosure by the public office holder to the parties involved in any particular matter coming before him or her, of facts that would ordinarily give rise to a conflict of interest, assuming that all parties acquiesce in his or her continuing to act in the matter; and

(5) there is some risk that may have to be accepted in applying guidelines, even of the kind described above, to quasi-judicial offices created by statute. This risk would be that the holder of such an office may thereby be exposed to disqualification in relation to a particular matter in circumstances where the tribunal of which he or she is a member is constituted with a statutory quorum, with the result that the tribunal could find itself unable to hear or deal with the matter at all.

The proposals under consideration for quasi-judicial guidelines embody four main points: (1) the quasi-judicial official, in performing judicial functions, must abide by the same rules regarding conflict of interest as the holders of judicial office; (2) quasi-judicial officials must deal with matters that come before them in their judicial capacities with free, independent and impartial minds; (3) any business or personal relationships which would compromise or prejudice the independence of the office must be avoided; and (4) quasi-judicial officials must limit their personal holdings to ones which will not give rise to any possible bias.

By 1978, further work was being done in the government to develop appropriate guidelines for quasi-judicial bodies, although the essential provisions from the earlier versions remain the same. However, at this stage, it was felt only 14 organizations in the federal government could be identified as "quasi-judicial" and thus subject to such guidelines. These were the Anti-Dumping Tribunal, the Atomic Energy Control Board, the Canadian Radio-television and Telecommunications Commission, the Canada Labour Relations Board, the Board of Examiners under the

Canada Land Survey Act, the National Energy Board, the Canadian Transport Commission, the Public Service Staff Relations Board, the Unemployment Insurance Commission, the Energy Supplies Allocation Board, the Administrator under the Anti-Inflation Act, the Restrictive Trade Practices Commission, the Canadian Human Rights Commission, and the Tariff Board.

The revised draft guidelines of 1978 were, however, never acted upon, since there remained a concern about the principle involved in the application of guidelines to a quasi-judicial body. Essentially, this concern involved the question of the propriety, under our parliamentary system of government, of Cabinet "interfering with" or "appearing to influence" quasi-judicial bodies.

Although no official decison was taken not to pursue the issue of guidelines for quasi-judicial bodies, priorities began to change in the late 1970s and the subject remained dormant, until it resurfaced now as something we must deal with in the course of recommending approaches to deal with ethical conduct in the public sector.

This brief historical resumé indicates the profound concern which others in the past have felt about attempting to apply general procedures or guidelines to quasi-judicial bodies, and which leads us to recommend an alternative approach: the development of a specifically tailored "supplemental code" for each quasi-judicial body to be enacted as part of the governing statute of that body.

Before examining how this proposal will work, we wish to conclude this brief survey of developments during the past decade by referring, Prime Minister, to a statement you made in the House of Commons in mid-1978 in response to a question:

> "...the guidelines we issued (in 1973) did not apply to judicial or quasi-judicial officers. ...Although we did look at the matter of holders of judicial or quasi-judicial offices, it was our feeling at the time we should not publish guidelines in that area, certainly not without further discussions with the courts. I think the House will understand that the government was somewhat reluctant to go from the executive or legislative branches into the judicial branch. That is why we have not published guidelines... I can tell the House that on the basis of the public guidelines, there were none for holders

> of quasi-judicial offices... If the House in some way wants the government to publish guidelines in that area, we will consider the matter ... As a matter of fact, we did look into it before publishing the guidelines, but then we thought it would be more compatible with the division of powers and the non-interference by the executive into the quasi-judicial branches that we do not publish guidelines.

That there is a concern to develop some guidelines or rules for quasi-judicial bodies cannot be denied. There have been ministers, for example, who in recent years requested that the existing guidelines be applied to certain quasi-judicial entities. Thus the guidelines came to apply, for example, to full-time members of the National Parole Board, the Restrictive Trade Practices Commission, the Atomic Energy Control Board, and the Commissioner of Patents.

Other quasi-judicial bodies have taken it upon themselves to develop guidelines, and in this fashion, for example, the Guidelines on Conflict of Interest for Citizenship Judges were developed in 1979. The value of this exercise was attested to subsequently, when the minister responsible for citizenship judges learned of a conduct problem which required discipline, and was greatly relieved to learn that there had already been put in place by the Citizenship Judges, on their own initiative, a set of guidelines which could be used to deal with the matter.

Seen from the other side, it is equally true that guidelines for quasi-judicial bodies can serve to provide answers and guidance to those individuals who find themselves in potential conflict situations, and can afford them the same protection as is the case for other Governor-in-Council appointees. In short, there are instances where such rules would be welcomed, not resented, and this fact became clear to us, in the course of our hearings.

Our proposal, therefore, is the careful development of supplemental rules and procedures to assist in the avoidance of conflicts of interest, and to enable individuals to comply with the Code of Ethical Conduct. These supplemental rules and procedures must be appropriate for each quasi-judicial body in terms of its own requirements. We suggest that in developing such rules, the "Procedural Rules for Avoidance of Conflicts of Interest" (referred to in Chapter 12) could be used as a model. Its provisions which are considered appropriate for the quasi-judicial body in question can be adopted, or modified as required.

These sets of supplemental rules for all quasi-judicial bodies, would then be collected and included in an omnibus amendment clause in the Ethics in Government Act, for the purpose of amending each relevant statute (The Broadcasting Act, The Anti-Dumping Act, The Combines Investigation Act, and so forth) to add these provisions to the governing statute of each quasi-judicial body.

In the result, these rules and procedures will be laid down by Parliament as attributes of the quasi-judicial body, just as Parliament had earlier established certain other attributes of the body when bringing it into existence by the original enactment.

Because these procedural rules will have been developed in co-operation with the quasi-judicial body itself, because they are not general procedures of all inclusive application but are tailored to the quasi-judicial body's particular requirements, because they are enacted by Parliament, and because they will then constitute part of the legal framework for operation of the quasi-judicial body in question, they cannot be construed as "interference" by the government with a judicial-type body.

It will be recognized that our approach with respect to quasi-judicial bodies parallels our approach to Crown corporations, where there is also a concern about autonomy (although for vastly different reasons) and the solution we propose there is to develop specifically suited procedures and supplemental codes which can, in the case of the Crown corporations, be enacted as regulations under the governing act.

We have taken the inspiration for this approach from the fact that it has already been tried, in a limited way, in several statutes governing quasi-judicial bodies. For example, the National Energy Board Act, which establishes the National Energy Board consisting of 11 members appointed by the Governor-in-Council, stipulates in section 3 that a person

> ...is not eligible to be appointed or to continue as a member of the Board if he is not a Canadian citizen or if, as owner, shareholder, director, officer, partner or otherwise, he is engaged in the business of producing, selling, buying, transmitting, exporting, importing or otherwise dealing in hydrocarbons or power or if he holds any bond, debenture or other security of a corporation engaged in any such business.

Likewise, in the Anti-Dumping Act, the Canadian Radio-television and Telecommunications Act, and the National Transportation Act, there are clear conflict of interest provisions. By contrast, the Atomic Energy Control Act and the Combines Investigation Act contain nothing that is in the category of the type of provision described above for the National Energy Board.

The same might almost be said of the Tariff Board Act, although two provisions are partly related to conflict considerations. These are section 3(7), which states that no member of the Tariff Board is eligible to be a candidate for election to the House of Commons until after the expiration of two years from the date when he ceased to be a member of the Board, and section 5(10) which states that, if evidence or information that is by its nature confidential, relating to the business or affairs of any person, firm or corporation, is given or elicited in the course of any inquiry, the evidence or information must not be made public in such a manner as to be available for the use of any business competitor or rival of the person, firm or corporation, respectively.

In the case of the Anti-Dumping Tribunal, section 21(7) of the Anti-Dumping Act stipulates that each member "shall devote the whole of his time to the performance of his duties under this Act and shall not accept or hold any office or employment inconsistent with his duties and functions under this Act".

With respect to the CRTC, section 4 stipulates that a full-time member "shall devote the whole of his time to the performance of his duties under this Part", while section 5 deals with outside interests in the following terms:

> (1) A person is not eligible to be appointed or to continue as a member of the Commission if he is not a Canadian citizen ordinarily resident in Canada or if, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise, he
>
> (a) is engaged in a telecommunications undertaking; or
>
> (b) has any pecuniary or proprietary interest in
>
> (i) a telecommunications undertaking,
>
> or
>
> (ii) the manufacture or distribution of telecommunication apparatus except where such distribution is incidental to the

general merchandising of goods by wholesale or retail.

(2) Where any interest prohibited by subsection (1) vests in any member by will or succession for his own benefit, he or she shall, within three months thereafter, absolutely dispose of such interest.

Finally the National Transportation Act, in sections 8 and 9, deals with conflict of interest matters in these terms:

8. Whenever any commissioner is interested in any matter before the Commission, or of kin or affinity to any person interested in any such matter, the Governor-in-Council may, either upon the application of such commissioner or otherwise, appoint some disinterested person to act as commissioner pro hac vice; and the Governor-in-Council may also, in case of the illness, absence or inability to act of any commissioner, appoint a commissioner pro hac vice; but no commissioner is disqualified to act by reason of interest or of kindred or affinity to any person interested in any matter before the Commission.

9. (1) No member or officer of the Commission shall, directly or indirectly,

(a) have any interest in, or in any undertaking of, any railway company, air transport company, commodity pipeline company, shipping company or motor vehicle undertaking or have any interest in the obligations of any such company or undertaking;

(b) engage in manufacturing or selling aircraft, ships, railway rolling stock, motor trucks, trailers of buses, or pipeline equipment, or in the transport of goods or passengers by any mode of transport for hire or reward; or

(c) have any interest in any device, appliance, machine, patented process or article, or any part thereof that may be required or used as part of the equipment of any railway or rolling stock thereof, aircraft, ship, pipeline, motor truck, trailer or bus, or of any work or undertaking subject to this Act, the Railway Act, the Aeronautics Act or the Motor Vehicle Transport Act.

> (2) Where any interest prohibited under subsection (1) vests in any member or officer of the Commission by will or succession for his own benefit, he shall, within three months thereafter, absolutely dispose of such interest.

We therefore recommend this approach. If it is accepted, it would require a specific task to be performed, consisting of, first, identifying (for purposes of excluding from the application of the "Procedural Rules to Avoid Conflicts of Interest") those bodies considered to be "quasi-judicial"; secondly, working through a check-list with each quasi-judicial body to determine which rules need to be included in that quasi-judicial body's governing statute; and, third, grouping these rules for each such body as amendments to their respective statutes, so they could then be incorporated, which we recommend, as a single omnibus clause in the Ethics in Government Act.

CHAPTER 17

RULES OF ETHICAL CONDUCT FOR CROWN CORPORATIONS

(a) Autonomy of Crown Corporations

The status and role of Crown corporations has engaged the attention of many individuals at the federal level. Our interest is to find the appropriate point of entry for a régime of ethical conduct on the part of those who run and work in Crown corporations. We believe that, in considering the need and desirability of an applicable set of rules for ethical conduct, the degree of autonomy of Crown corporations from the government is only relevant in terms of how such rules are to be established. The approaches being followed with respect to conflict of interest seem to be those of the Crown corporations themselves.

It is our view that the public perception of Crown corporations is that they are a part of government. No matter how autonomous some Crown corporations are, the Canadian public still thinks of Air Canada, Canadian National Railways, the Canadian Broadcasting Corporation, the Northern Canada Power Commission, the Science Council of Canada, or Canada Mortgage and Housing Corporation as simply different faces of the federal government.

(b) Classification of Crown Corporations

Section 66 of the Financial Administration Act defines a Crown corporation as a "Corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, and includes the Corporations named in Schedule B, C and D (of this Act)."

In 1977, the Treasury Board Secretariat published a list of government owned and controlled corporations which included 14 "Departmental Crown Corporations" encompassing advisory and granting councils like the Medical Research Council, regulatory agencies such as the Atomic Energy Control Board, and a number of organizations which are parts of departments, such as the Director of the Veterans Land Act; 19 "Agency Corporations" including marketing agencies such as the Canadian Saltfish Corporation, a number of corporations conducting business for the government such

as Defense Construction (1951) Ltd., and some operating in a wider market like Atomic Energy of Canada Ltd.; 21 "proprietary corporations" engaged in commercial operations, such as Air Canada and Via Rail, and some financial guarantee and insurance concerns as the Export Development Corporation and the Farm Credit Corporation; 27 "other government corporations" (which seem to have few common characteristics other than the fact that they have been purchased, created or sponsored by the federal government, and ranging from the Bank of Canada to DeHavilland Aircraft of Canada Ltd.; 24 "mixed enterprise corporations" ranging from the Canada Development Corporation to the Blue Water Bridge Authority, share capital corporations owned or controlled jointly by the federal government and other governments, organizations, or individuals; a number of "subsidiary corporations and subsidiaries" (which are share corporations that are majority owned or controlled by the Crown or other government corporations); some "associated corporations" (in which the government either directly or through another corporation has a minority interest, such as Polysar Ltd. and Arctic Oil Ltd.); and, finally, 18 organizations labelled "other entities and associates" (which comprise a wide variety of quasi-public corporate bodies, many of which are non-profit organizations such as the Vanier Institute of the Family and the Forest Engineering Research Institute of Canada).

The Royal Commission on Financial Management and Accountability in 1979 indicated that the functions of Crown agencies pose two major issues, the first being the identification, classification and rationalization of the arm's length relationships of Crown agencies with government and Parliament. The report suggests criteria distinguishing Crown agencies from departments or from organizations in the private sector including nature of the tasks, ownership, source of funds, organizational forms, delegation and autonomy. However, experience has shown that classification of Crown corporations is difficult, and probably unnecessary for our purposes. Whatever sort of Crown corporation it is, the importance of ethical conduct by its personnel is manifest.

(c) Ethical Conduct in Crown Corporations

We wish to summarize some of the activity in the past several years pertaining to Crown corporations and questions of ethical conduct, and then proceed to make recommendations which will be compatible with other policy initiatives currently being developed to restructure the role and relationships of the Crown corporations with the government, regardless of what form those relationships may finally take.

In 1977, the Privy Council Office published a paper presenting the government's proposals for Crown corporations. It

challenged conventional wisdom with respect to Crown corporations that government and Parliament must avoid all but cursory intervention in their affairs lest their commercial performance be jeopardized. Without exception, Crown corporations were established by the government to achieve broad policy objectives. In the case of proprietary Crown corporations, the implementation of broad policy objectives is to be carried out as much as possible within commercial discipline, but the pursuit of commercial goals was never intended to override broad social, cultural or economic goals many of which could not be justified on purely commercial grounds. These broad goals supplement the economic objectives of the corporations.

The government proposed that directors and officers of Crown corporations be brought under the general scheme of duties and liabilities of directors as specified in the Canada Business Corporations Act in the interests of uniformity and providing directors of Crown corporations with clear standards of conduct upon which they could be judged. In the process, it was felt that a further measure of uniformity would be introduced by corporation law in Canada.

The Act specifies two types of duties for directors and officers: a fiduciary duty, and the duty of care. The first is a duty to act in good faith and applies to the exercise of power and the use of knowledge gained in an official capacity. Under the Act, a director is enjoined from using powers or privileged knowledge to personal advantage or to the advantage of someone in competition with the corporation. This standard would require directors and officers of Crown corporations to disclose in writing to the corporation any material interest they may have in a contract with the corporation. Directors would also be prohibited by law from voting on such contracts in most cases. Part-time directors and certain officers would also be required to disclose their directorships in private sector corporations and full-time directors and certain officers would be prohibited from accepting outside directorships without the express approval of the Governor-in-Council.

Other aspects of the suggested conflict of interest régime would remain informal, although the proposed "directive power" could be used to give them force. Under this scheme, full-time Governor-in-Council appointees to Crown corporations would be subjected to the same requirements as deputy ministers.

It was also proposed to ask Crown corporations to adopt guidelines for their employees similar to those for public servants, including those respecting commercial activities on leaving the employ of the government. The suggested legislation included extensive provisions on conflict of interest for directors and officers. It was proposed, for instance, that a

person holding a full-time position in a Crown corporation could not accept a directorship in a private sector corporation, would have to disclose the directorship to the appropriate minister within a specified time, and would have to resign that directorship if he or she continued to hold a full-time position. A person would not be prevented by this provision, however, from accepting or holding a directorship in a private sector corporation, if the consent of the Governor-in-Council was obtained.

The proposed legislation set out a number of details about the acceptance of full-time positions, part-time positions, and directorships with private sector companies, as well as rules for directors or officers with a material interest in any contract or proposed dealing with the Crown corporation, requiring written disclosure of the interest.

In 1979, the Royal Commission on Financial Management and Accountability (the Lambert Report) stated that up-to-date codes should be established by the boards of directors of Crown corporations, establishing policy for making payment, recording transactions, contributions, gifts, and the provision of free services, use and control of agency arrangements, including authority for payments to agents, and compliance with the laws of other countries.

The Lambert Report suggested that codes be developed in each corporation to meet its requirements and contain provisions to ensure audit and compliance. The minister responsible should receive a copy of the code, and should be able to request changes in writing if it were not in accordance with government policy. Once accepted by the Board, application of the code, including changes proposed by the minister, should become the Board's responsibility. Monitoring of compliance would be the responsibility of the Board.

"Shared enterprises" (Crown agencies in which the federal government has taken a direct equity position in common with other participants for the purpose of implementing a public policy or satisfying a public need) should follow accepted private sector management standards and practices in all areas, including "insider" classification and reporting, confidentiality, and conflict of interest requirements. The government has an obligation, the Lambert Commission asserted, to ensure adherence to its standards of commercial and ethical practice by shared enterprises through representation on the Board.

Any government policy concerning freedom of commercial Crown corporations to operate like other business enterprises, should not affect the development of coherent policy to govern ethical conduct. The public interest component in the

role of Crown corporations (whereby the Crown corporations are accountable for and serve as instruments of public policy) argues for codes of conduct for employees of Crown corporations. The closer commercial crown corporations are to private sector businesses, the more persuasive is the argument for implementing a code of conduct since, in their sector companies, the Crown corporations would wish to adopt codes of ethics and rules for conflict of interest as a large number of Canadian private corporations have done in recent years.

(d) Present Codes of Ethics of Crown Corporations

In addition to those senior officials in Crown corporations who are subject to the current conflict of interest guidelines as Govenor-in-Council appointees, a number of Crown corporations have developed codes of ethics or rules about conflict of interest. In some cases these amount to a thorough-going code, in others to a few general provisions. The following is sampling of the present state of development on the ethics front:

The Canada Mortgage and Housing Corporation (CMHC) utilizes several different sets of guidelines. For members of the Board of Directors who are not officers of the corporation and who are not members of the public service, a set of guidelines have been compiled which include the provisions of the CMHC Act, provisions in Part IV of the Canada Business Corporations Act and those in Bill C-27 (an Act respecting Crown Corporations, given first reading in 1979, regarding conflict of interest and directors holding part-time positions).

The guidelines provide that a director cannot be a director, officer or employee of a lending institution, nor can he or she be employed in a provincial government or the Public Service of Canada, nor in any office or position for which salary is payable out of public money. Directors also may not have interests, direct or indirect, as shareholders in a lending institution and offers of appointment as a director of another corporation must be disclosed to the corporate secretary of CMHC, as must directorships held on the day of appointment as a director of CMHC.

There are rules of disclosure concerning other directorships or offices, or of interest in a material contract, and the Post-Employment Guidelines also apply. Other CMHC employees are subject to the 1973 Public Servants Guidelines and the supplemental Standards of Conduct contained in the CMHC Guidelines and Procedures Manual. These standards of conduct were developed to ensure, among other things, that no conflict exists or appears to exist between the private interests of an employee and his or her official duties. Funding provisions under the

National Housing Act may not be used by employees for investment purposes. Employees may not take part in public discussions, orally or in writing, of the affairs, policies or organization of the corporation. Employees are entitled to undertake secondary employment. The proscriptions against political activity are the same as those contained in the Public Service Employment Act, except that CMHC management reserves the right to grant leave to run for nomination or election. Transgressions would constitute misconduct, which could warrant dismissal.

The National Arts Centre has corporate by-laws which are specific in their direction:

No employee shall be in conflict of interest with the Corporation and, in particular:

a) have a direct or indirect interest in any contract with the Corporation, or any goods or services supplied to or work done by or for the Corporation (other than under his or her own contract for personal services) unless, because of the special nature of goods, services or work available from or through an employee, an advantage to the Corporation is not otherwise obtainable, the Director General shall authorize in writing the acquisition of such goods, services or work, with the approval of the Chairman or Vice-Chairman;

b) engage in employment or work for remuneration or profit, other than that included in this contract with the Corporation, unless expressly authorized to do so by the Director General, with the approval of the Chairman or Vice-Chairman.

The policy statement used by Air Canada is standard in asking employees to arrange their private affairs so as to avoid actual and apparent conflicts involving compromising situations and pecuniary and other interests. The code contains a list of potential conflict areas which are subject to disclosure, review and advice, including:

> serving as a director, officer, employee, member or consultant of a subsidiary or associated company, a supplier, large customer or competing company, or any other company, partnership, association or commercial entity that has a significant present or prospective business relationship with Air Canada if such service could either place on employees demands

> inconsistent with their duties, call into question their capacity to perform those duties in an objective manner, or cause job performance to suffer.

There is another listing of actual or apparent conflicts of interest which are to be avoided. These involve the improper use of information, and use of company materials and time for personal gain. Areas of conflict, actual or potential, are reviewed by the Air Canada Audit Committee. Employees are required to sign declarations of compliance "on hiring and subsequently from time to time".

The Canadian Wheat Board's regime on this subject consists of a set of guidelines which contain the standard clauses regarding financial interests, statements concerning privileged information and its disclosure during the period of employment, and a caution to employees about using confidential information after they leave the Board.

The Code of the Freshwater Fish Marketing Corporation is simple. Based on "fairness and impartiality", it prohibits gifts and favours of value in business relationships as well as monetary interests (employee and immediate family) in business related to the Corporation. Also banned is beneficial interest in commercial fishing operations in the area served by the Corporation.

A number of Crown corporations have chosen simply to adopt the 1973 Public Servants Guidelines as they stand. Examples of such Crown corporations are the Livestock Feed Board of Canada, and the Pacific Pilotage Authority of Canada.

Other Crown corporations, such as The St. Lawrence Seaway Authority and The Canadian Saltfish Corporation, have not drawn up guidelines on this subject for their employees.

(e) An Approach to Ethical Conduct for Crown Corporations

We wish to make a series of recommendations with respect to Crown corporations which are consistent with the general program proposed for the rest of the public service and compatible with the types of recommendations we anticipate will be made by others concerning the future role of Crown corporations in Canada.

There are two categories of people working in Crown corporations, those who are appointed by the government, and those who are hired by the Crown corporation. Each are subject to rules, the former by guidelines developed by the government, the latter by whatever code of conduct or similar rules that have been developed by the Crown corporation.

While many employees of Crown corporations may disagree with the public perception that they are part of the federal government, it is accepted generally that they are in some way part of the public sector. It is precisely for this reason that many of our earlier recommendations, and the terminology found in the Code of Ethical Conduct and elsewhere, uses the broader expression "public sector". Our clear intention is to devise a program which can be applied throughout all branches of the federal government's operations, including those which consider themselves to be autonomous. There is nothing in the Code of Ethical Conduct which should pose any problem to anyone working in a Crown corporation.

Second, with respect to Crown corporations which are active as business enterprises in the marketplace, the conflict of interest provisions in the Canada Business Corporations Act should be made applicable to them, in particular, section 115 which deals with disclosure by a director or officer of any interest in a material contract with the corporation, or of a material interest in any proposed contract with the corporation. The fiduciary duties of directors and officers of corporations, as set forth in section 117 of the Canada Business Corporations Act, should apply. In exercising their powers and discharging their duties, they face a legal duty to "act honestly and in good faith with a view to the best interests of the Corporation" and to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

Third, each Crown corporation should be required to develop its own supplemental code of ethical conduct for approval by the minister responsible and made public. We recommend the same procedure for Crown corporations that we recommend elsewhere for departments and agencies of government. Those which do not yet have supplemental codes should develop them, and those which have already developed some rules may wish to reformulate them with the assistance of the Office of Public Sector Ethics.

Responsibility for developing the supplemental code should, in our view, rest with the board of directors of each Crown corporation which has such a board. It will be the directors' responsibility to settle conflict of interest policy. For those boards of directors wishing assistance on this from the Office of Public Sector Ethics, we recommend preparation of a checklist of points to be dealt with, and drafting of a model supplemental code by the Office of Public Sector Ethics so that common definitions, terms and procedures will be in use throughout the entire public sector. We expect that, based on a number of the submissions made to us by heads of Crown corporations, any assistance from the Office of Public Sector Ethics in developing such a supplemental code would be most welcome. A supplemental code would deal with specific needs or requirements of a

particular Crown corporation, and would fill in the specific concerns that are not addressed in the over-arching principles from the Code of Ethical Conduct.

The supplemental code, as adapted by a particular Crown corporation, would be submitted for approval by the responsible minister and made public. These supplemental rules would apply to all in the Crown Corporation, from the top to the bottom. By leaving the decision up to the board of directors of each Crown corporation as to how extensively it wishes to deal with matters in its supplemental code, it is not necessary for us to differentiate between the types of Crown corporations as to their function in the market place. To implement this recommendation, we suggest a simple provision being added to the Ethics in Government Act, to require Crown corporations to develop by-laws along the lines of a model supplemental code prepared by the Office of Public Sector Ethics, but to leave primary responsibility for this task in their hands.

Fourth, the chairperson of a Crown corporation should be empowered to refer a matter to the Ethics Counsellor for advice or investigation, as the chairperson sees fit, similar to the way in which a deputy minister might deal with such a matter of ethical conduct arising in his or her department.

Fifth, upon their appointment to the board of directors of a Crown corporation, individuals should be required to disclose, on a confidential basis, their financial holdings and activities to the Ethics Counsellor. In this way, the Ethics Counsellor will be able to advise whether there is any likelihood of a conflict of interest problem which the director might wish to take into account in discharging his or her responsibilities, and to resolve by using the procedures available for this purpose. In our view, this disclosure requirement should apply equally to full-time and part-time directors.

Sixth, contracts of employment with Crown corporations should contain specific provisions relating to prohibited activity after leaving the employ of the corporation, along the same lines as those set out in Chapter 14 of this report which deals with post-employment policy for ministers and public servants. We do not favour an overly restrictive approach in this area. At the same time we recognize a public interest in protecting against the abuses which can arise in the post-employment situation.

Since many of those appointed by the Governor-in-Council as officers and directors of Crown corporations are part-time appointees only, the supplemental codes ought to take this into account, where necessary, to establish special rules. Very little may be needed in the way of additional rules, since the basic

conflict of interest and fiduciary duty provisions of the Canada Business Corporations Act would (if our recommendation on that point is carried through) apply and would govern the actions of directors and officers, whether full-time or part-time.

We believe that the foregoing recommendations comprise a mutually consistent approach for all Crown corporations. Our approach, we believe, allows the necesary degree of differentiation among various categories of Crown corporations in a way that achieves the merits of a written code of conduct, with common terminology and procedures throughout the public sector, but tailor-made to the needs of individual Crown corporations.

CHAPTER 18

IMPLEMENTING THE NEW REGIME

(a) Methods of Implementation

We have recommended substantive provisions to deal with conflict of interest matters and a number of additional proposals incidental or secondary to the substantive provisions.

Many of our recommendations can be implemented by Order-in-Council without further statutory authority. Yet some clearly require enactment by Parliament. One such exception relates to quasi-judicial bodies, whose statutes should be examined and amendments put before Parliament to ensure that there are adequate rules within each of the statutes to minimize conflicts of interest of their members and employees. Another exception relates to the recommendation that all Crown corporations be governed by Conflict of Interest provisions in the Canada Business Corporations Act and that the Board of Directors of each Crown corporation develop a written supplemental code appropriate to its own needs and adopt it by a by-law subject to approval by the Governor-in-Council. Still another is the proposal with respect to section 32 of the Public Service Employment Act.

We recommend that the new régime we propose, the principal features of which are:

- adoption of a Code of Ethical Conduct, applicable throughout the entire federal public sector, and

- formation of an Office of Public Sector Ethics to continue the present conflict of interest role of the Assistant Deputy Registrar General and be vested with additional powers,

be approved by Parliament, either by resolution or preferably by statute. The other provisions could be incorporated in the statute.

A debate on the subject would serve as the forum within which the many considerations and concerns dwelt upon in this report could be aired. Further, endorsement by Parliament of the

Code of Ethical Conduct for those in the public sector would give it greater authority, and invest it with symbolic value. Similarly, the creation of the Office of Public Sector Ethics by an Act or resolution of Parliament, rather than by Order-in-Council, would enhance the authority of that Office and the Ethics Counsellor.

It would not be wise, however, to put into an Act of Parliament the details of the procedures that have to be followed by public office holders to minimize conflict of interest. These procedures will undoubtedly be modified from time to time as circumstances change, and the necessity of going to Parliament for amendments to the statute would result in inevitable and undesirable delays in putting necessary changes into effect. It is sufficient, in our view, that the procedures be promulgated as Regulations pursuant to the statute, and that, as provided in the draft statute, the Ethics Counsellor report on the extent of compliance.

(b) Outline of Possible Ethics in Government Act

For discussion purposes, we have prepared an outline of a possible bill which could be introduced in Parliament if this is the vehicle chosen to implement the recommendations. The Act would require public office holders to act in accordance with certain principles of conduct. It would provide for the creation of the Office of Public Sector Ethics and the appointment of an Ethics Counsellor as head of that Office whose functions would be to assist in the administration of procedures designed to minimize conflicts of interest of those in the public sector. It would also provide for amending the statutes of certain quasi-judicial agencies for the purpose of minimizing conflicts of interest of members of those agencies.

The draft Bill appears as Schedule E to this report.

(c) Need for Discussion and Understanding Prior to Implementing Program

Implementation by an Act of Parliament will generate far greater public discussion than the mere promulgation of an Order-in-Council, and open and full debate of the questions raised in attempting to deal with ethics in Government is vital. This is seen as an important part of the consciousness-raising exercise that must be part of any movement to legislate on this subject.

In your letter to us, Prime Minister, you asked us to consider the experience of private industry. In doing so, we spoke with a number of senior officials in companies which have in recent years developed conflict of interest or code of ethics rules and one clear message emerged. It is not valuable, indeed

it can be counter-productive, simply to announce that new policies are in place, and post them on the bulletin boards on company premises. A deliberate effort to evolve the rules gradually is required. Those who will be affected should be involved in discussions about the rules and be able to make suggestions that are taken into account.

In addition to this participatory approach, a second clear lesson from industry is to involve the most senior executives and managers. Companies which have had the greatest degree of acceptance and success with conflict of interest policies are those where the Chief Executive Officer, rather than just the Director of Personnel, took an active interest in the subject and signaled to one and all that this was a matter of true importance. Translated into public sector terms, these lessons suggest some obvious courses of action.

(d) A Further Method of Implementation: Contract Law

We believe it is important to give the Code of Ethical Conduct the force of law, which can be done in at least two ways. One is to make the Code binding as statute law through its enactment as part of an Act of Parliament, the course we recommend. A second way to give the Code of Ethical Conduct additional legally binding force is to have it incorporated as a term or condition in employment contracts with the Government of Canada. If the approach of contract law is adopted, it will be manifested in different ways depending on the position of the individual concerned. In some cases, for those who are subject to a collective agreement, the Code of Ethical Conduct could be incorporated in the collective agreement. In cases of public office holders not signatories to any employment contract but who are simply appointed to office at pleasure or for a specified term, the approach might be different.

Where the ethical rules are made an express part of a public office holder's contract this would include not only the Code of Ethical Conduct (which presumably would already be binding under the wording of the statute which enacts it), but also the supplemental departmental or agency code. In all cases where practical, we recommend that the Code of Ethical Conduct be incorporated in any employment contract or similar document governing the terms and conditions of employment or holding office under the Crown in Right of Canada. In cases where such contracts are, in effect, nothing more than an exchange of letters, the signed acceptance of which forms the agreement between the individual and the federal government, we recommend that the Code of Ethical Conduct be set forth in such letters as being one of the terms and conditions governing the holding of such a position. The practices of various departments in sending out letters of offers have been reviewed. Some departments do not

refer to the conflict of interest guidelines; some refer to them and give a scanty statement of what they deal with and suggest where the guidelines can be obtained; still others send a copy of the guidelines and related material.

In all cases, whether there exists an employment contract or not, we recommend that each public office holder be required, once each year, as part of a scheduled program, to sign a copy of the Code of Ethical Conduct. This practice is followed in a number of private companies for all staff from the most junior person to the Chief Executive Officer. While we do not favour creation of a papermill, this procedure can be appropriate in certain instances.

Variations of this approach are already followed in some government departments and offices. For example, the Department of Finance has a form on which an employee certifies as follows: "I acknowledge that I have this day received a memorandum on the subject of 'Conflict of Interest' from the Deputy Minister of Finance, Canada, dated March 19, 1982 which memorandum includes an extract of the Order-in-Council entitled "Public Servants Conflict of Interest Guidelines" being PC 1973-4065 and dated December 18, 1973." At the Office of the Auditor General, employees are required to sign a statement, on commencing employment with the Office, that neither they nor their immediate family has any interest that could jeopardize or call into question their judgement or objectivity. This disclaimer also requires that the employee inform the appropriate authorities in the National Capital Office of any potential conflict of interest that might arise at a later date.

CHAPTER 19

CONCLUSION AND SUMMARY OF RECOMMENDATIONS

(a) Concluding Comments

Our enquiries have led us to the conclusion that the time was ripe for a comprehensive inquiry into the rules now governing ethical conduct in the federal public sector, particularly in relation to conflicts of interest. Not that there is any serious question about the integrity of public office holders. By any measure the standards of their ethical conduct are high for which as Canadians we should be grateful. However, the rules, which have evolved gradually over the years to deal with problems as they arose, need to be reformulated to ensure consistency in content and administration and to make them as simple, fair and reasonable as possible.

Our Terms of Reference asked us to have "particular regard to the need to ensure both public confidence in the integrity of the governmental process and the need to attract to government individuals of high calibre from all walks of life." We have endeavored to achieve this balance in our recommendations. Canadians of high calibre, in our view, are not going to be deterred from taking public office by requirements to conduct themselves in office in an ethical fashion or by reasonable rules which require them to avoid activities and to divest themselves of holdings that would involve conflicts between their public duties and their private interests. Indeed, such individuals will be encouraged to enter public life by the knowledge that the prevailing standards of conduct are high.

It is, however, unfair to public office holders and it does not encourage recruitment of Canadians of high calibre if the rules - as some of them now do - impose unnecessary sacrifices on public office holders and their families. Our recommendations therefore are directed at establishing rules that are clear and workable, but no more than are necessary.

In this report, we have reviewed practices in relation to ethical conduct and conflicts of interest in other jurisdictions with parliamentary forms of government like our own - the Canadian provinces, the United Kingdom, Australia and New Zealand. As might be expected, there are very great differences among them but the approaches are similar to those followed by the federal

government. Several of the provinces describe their rules as "guidelines". As a generalization, it is fair to say that the existing federal guidelines are as comprehensive in dealing with ethical conduct and conflicts of interest as those of any of the provinces of Canada, more comprehensive than most of them, and noticeably more comprehensive than the rules that exist in the United Kingdom, Australia and New Zealand. It is noteworthy that in only one of the parliamentary jurisdictions that we examined are there any written restrictions on the activities of ministers when they leave office, and that is in the Province of Newfoundland.

Hence, our recommendations are in no way inspired by a need to "catch up" with the provinces or with other countries.

Practices in the United States were also examined. Although that country has a different form of government and a more legalistic approach, which we do not think appropriate in Canada, we have been impressed by some of the things that are done at both the federal and state levels to ensure that the rules relating to ethical conduct and conflicts of interest are known throughout their respective public services, as well as by the emphasis on disclosure and the so-called "Sunshine-in-Government" approach.

We also asked for and obtained a good deal of up-to-date information about how matters of conduct and conflicts of interest are handled by the professions and business organizations. The evidence which this material provides of the growing sensitivity of those in the professions and business as to public perceptions of their ethical standards is impressive. While the professions of medicine, engineering and law long ago formulated principles of professional conduct, these principles are being re-examined to see if they meet rising public standards and expectations. In business, the same tendency is apparent. More and more companies, particularly the larger ones, are formulating and applying codes of conduct for their officers and employees. Our examination of business practices in large private corporations reinforced our view about the desirability of distinctive codes of conduct for each federal Crown corporation, in addition to any code of conduct applying to public office holders throughout the public sector.

In the course of our work we received hundreds of letters and interviewed many people. All of those interviewed were critical of some aspect of the current guidelines. Those letters that related to the guidelines were similarly critical. Yet no one disputed the necessity for some form of written rules and few, if any, criticized the basic principles on which the current guidelines are based. Although both of us who are members of the Task Force, entered Cabinet, one in 1957 and one in 1963,

before there were any written guidelines of this kind, we share the view that written rules have become necessary and that the principles underlying the current guidelines are sound.

However, there are serious defects in content and administration in the current guidelines and other related rules dealing with conduct and conflicts of interest in the federal public sector. Chief among these defects are the following.

- The current guidelines are a mixture of principles of conduct and procedures to minimize conflicts of interest, some of which are hortatory and some of which are mandatory, leading to uncertainty as to whether they have to be observed.

- The current guidelines do not take into account sufficiently the varying duties and responsibilities of those appointed to public office by the Governor-in-Council.

- At levels below deputy minister, there is a lack of consistency in the content and administration of the rules.

- The current guidelines do not have the flexibility necessary to avoid inadvertent and unnecessary hardship to individuals in all instances.

- Quite properly, the current guidelines do not apply to quasi-judicial agencies of government, but there are either no rules or inadequate rules to govern the conduct of members of some of these agencies.

- The rules of conduct and the procedures for minimizing conflict of interest applying to Crown corporations and their officers need clarification.

- The guidelines applying to the activities of public office holders when they leave office and enter private life -- the so-called post-employment guidelines -- do not sufficiently recognize the differences between ministers and senior public servants in the circumstances surrounding their departure from office, and are ambiguous or, in some respects, unnecessarily restrictive.

While our recommendations are directed to remedying these defects, they have a broader purpose as well, which is to enhance public confidence in the integrity of the governmental process at the federal level. We believe the time has come to

codify and make better known the rules of ethical conduct that prevail in the public sector and to enhance their authority by parliamentary approval.

We also believe that the establishment in government of an Office of Public Sector Ethics concerned solely with the administration of the procedures for minimizing conflicts of interest and headed by a person of recognized status and integrity would help to enhance public confidence.

(b) Summary of Principal Recommendations

This report contains many recommendations relating to conduct and conflicts of interest in the public sector. The principal recommendations, i.e. those that illustrate our general approach, can be summarized as follows. To facilitate reference, the relevant chapters of the report are indicated in parentheses.

A. Simplicity, Fairness, Reasonableness

Rules and procedures dealing with ethical conduct to be based on the three concepts of simplicity, fairness and reasonableness. (Chapter 2)

B. Individual Responsibility

The principle of individual responsibility for one's conduct to be maintained in any system of rules respecting ethical conduct in the public service. (Chapter 4)

C. Reformulation of the Rules

The word "guidelines" be abandoned as ambiguous. The content of the current guidelines be replaced by:

(i) a short, simple Code of Ethical Conduct, binding upon all public office holders;

(ii) Procedural Rules to Minimize Conflicts of Interest, such as those requiring public office holders to divest themselves of securities and other holdings, to be applied in relation to their rank and classification and, where practicable, in relation as well to their duties and responsibilities. The most comprehensive of these procedural rules to be applied, as now, to ministers and deputy ministers.

(iii) Supplemental Codes of procedures and rules, to meet particular conflict of interest problems encountered by individual departments, Crown corporations, and agencies of government. Existing

supplemental codes to be restated, employing common terminology and uniform procedures. (Chapter 12)

D. Office of Public Sector Ethics

Formation of an Office of Public Sector Ethics, headed by a highly respected senior person to be known as the Ethics Counsellor.

This Office to absorb the functions currently performed by the Assistant Deputy Registrar General (ADRG) and to have additional powers to advise, educate, administer, investigate and exercise authority in prescribed cases to modify or waive procedural rules where no violation of the Code of Ethical Conduct is involved.

The new Office to have, in comparison with the ADRG, a clearer mandate, broader powers, and a higher public profile. (Chapter 13)

E. Judges and Quasi-Judicial Bodies

To preserve the independence of the judiciary, federally appointed judges, although to be governed by the Code of Ethical Conduct, to remain separate from application of the Procedural Rules to Minimize Conflicts of Interest, and instead to continue to be governed by the Judges Act in this regard.

Similarly, for quasi-judicial bodies to maintain sufficient independence, a specifically tailored "supplemental code" for each to be enacted as part of its governing statute. Such supplemental rules and procedures to be appropriate for each quasi-judicial body in terms of its own mandate, developed in cooperation with the quasi-judicial body itself. (Chapter 16)

F. Crown Corporations

Crown corporation personnel, as part of the federal public sector, to be subject to the Code of Ethical Conduct, Governor-in-Council appointees to Crown corporations to be subject to the Procedural Rules to Minimize Conflicts of Interest, and employees hired by the corporation to be subject to whatever supplemental code of conduct is developed by the Crown corporation. Each Crown corporation to develop its own supplemental code of ethical conduct for approval by the Minister responsible. Responsibility for developing a supplemental code to rest with the board of directors, with a provision in the Ethics in Government Act requiring each Crown corporation to do so in accordance with a model code prepared by the Office of Public Sector Ethics.

The chairperson of a Crown corporation to be empowered to refer a matter to the Ethics Counsellor for advice or investigation, as he or she sees fit.

Upon appointment to a board of directors of a Crown corporation, individuals to be required to disclose, on a confidential basis, their financial holdings to the Ethics Consellor.

Contracts of employment to specify prohibited activities in a post-employment situation.

Officers and directors of Crown corporations active in the market place to be subject to the conflict of interest provisions of the Canada Business Corporations Act. (Chapter 17)

G. Divestment of Holdings

The following changes to be made in the present procedures for minimization of conflicts of interest:

(i) restoration of frozen trusts as an alternative form of divestment of securities for ministers, subject to specified limitations and approval by the proposed Office of the Public Sector Ethics;

(ii) introduction of a de minimis rule to avoid unnecessary trouble and expense for those who have small holdings or investments;

(iii) enlargement of the scope of public and private disclosure as an alternative to divestment by placing one's assets in trust or by selling them. (Chapter 6)

H. Ambassadors and Heads of Post

Foreign service officers who are Governor-in-Council appointees, such as ambassadors and heads of post, to be treated as regular public servants under the jurisdiction of Department of External Affairs and subject to the supplemental rules of that department. (These public servants are currently being subject to full divestment rules, as Governor-in-Council appointees.) (Chapter 9)

I. Spouses

Clarification of the current guidelines relating to spousal and other family member's assets and activities to be incorporated in the Procedural Rules to Minimize Conflicts of Interest and in the supplemental codes of conduct for departments,

agencies and Crown corporations. Transfers of assets to a spouse or family member not to be made to avoid the operation of the procedural rules. (Chapter 11)

J. Post Employment Activities

The code of ethical conduct to include the following:

Public office holders have a duty not to act, after they leave office, in such a manner as to cast doubt on the probity and impartiality of the governmental process or in any other way to diminish public confidence in the integrity of government.

Any restrictions to implement this provision of the Code to be as few and as specific as possible so as to facilitate movement between the public and private sectors and to recognize the differences between ministers and non-elected office holders in the circumstances surrounding their departure from office.

Having in mind these principles,

The Procedural Rules to Minimize Conflicts of Interest to stipulate time limits (a "cooling-off" period) for such post-employment matters as: (1) acceptance of directorships; (2) making of representations by former public office holders; (3) use of confidential information; and (4) switching sides with respect to issues with which one was identified while in public office.

For dealings between former office holders and the government, the onus to be placed squarely upon current office holders to avoid preferential treatment in their dealing with former office holders.

Former public office holders to have the right to present the facts of their proposed private employment to the Ethics Counsellor and seek a waiver or modification of the "cooling-off" period on the grounds that what they propose to do does not reflect adversely on the integrity of government. Such requests, and rulings, to be in writing and made public. (Chapter 14)

K. Political Activities of Public Servants

Restrictions on political activities of public servants and public comment by them to remain in principle as they are now, but to be included in the proposed Code of Ethical Conduct, and administrative responsibility transferred from the Treasury Board and the Public Service Commission to the Office of Public Sector Ethics.

Section 32 of the Public Service Employment Act be transferred to the proposed Ethics in Government Act, so the Office of Public Sector Ethics will be responsible for dealing with requests of non-elected public office holders for leave to work in a political capacity. (Chapter 15)

L. Parliamentary Action

Enactment by Parliament of an Ethics in Government Act, to make binding on the entire federal public sector the Code of Ethical Conduct, to establish the Office of Public Sector Ethics, to grant authority to promulgate, in the form of regulations, Procedural Rules to Minimize Conflict of Interest, and to deal with related matters such as ethical conduct procedures for Crown corporations and for quasi-judicial agencies. (Chapter 18)

M. Employment Contracts

To give the Code of Ethical Conduct the further force of law, incorporate it as a term of one's employment contract with the Government of Canada, where appropriate. (Chapter 18)

SCHEDULE A

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We wish to thank those who took the time to appear at hearings and make submissions with respect to conflict of interest matters including a number of representatives of the private sector, and individual citizens. Those interviewed who have a present or past association with the public sector include Hon. Lincoln Alexander, former Minister of Labour; James P. Bruce, Assistant Deputy Minister, Atmospheric Environment Service, Environment Canada; Robert B. Bryce, former Clerk of the Privy Council; Hon. J. Judd Buchanan, former Minister of State for Science and Technology; Hon. Iona Campagnolo, former Minister of State for Fitness and Amateur Sport; Edmund Clark, Associate Secretary of Treasury Board; Sylvain Cloutier, President, Export

Development Corporation; James C. Corkery, Master-President, Royal Canadian Mint; Hon. Barnett J. Danson, former Minister of National Defence; Hon. Robert R. de Cotret, former Minister of State for Economic Development; Paul W. Dick, Member of Parliament; Geoffrey C. Edge, Chairman, National Energy Board; David C. Elder, Director, Executive Pool/Secondments Coordination Division, Department of External Affairs; Keith Evans, Department of Justice; R. Gordon L. Fairweather, Chief Commissioner, Canadian Human Rights Commission; Hon. Alastair W. Gillespie, former Minister of Energy, Mines and Resources; Dr. James Gillies, Dean of the Faculty of Administrative Studies, York University, and former Member of Parliament; Hon. Heward Grafftey, former Minister of Science and Technology; James F. Grandy, former Deputy Minister, Department of Industry, Trade and Commerce; James G. Harris, Assistant Deputy Minister, Personnel Branch, Department of External Affairs; Ivan L. Head, President, International Development Research Centre; Hon. Céline Hervieux-Payette, Minister of State for Youth; Paul Labbé, President, Canadian Industrial Renewal Board; Dr. J. Maurice LeClair, President of Canadian National; Hon. Edward C. Lumley, Minister of Industry, Trade and Commerce; Marcel Massé, Under-Secretary of State for External Affairs; R.K. McLeod, Public Servant, Transport Canada; Dr. John Meisel, former Chairman, Canadian Radio-Television and Telecommunications Commission; C.R. Nixon, former Deputy Minister of National Defence; Senator Michael Pitfield, former Clerk of the Privy Council; Hon. John M. Reid, Member of Parliament; Simon S. Reisman, former Deputy Minister of Finance; Judge Margaret Rideout, National Coordinator for Citizenship Judges; Donald K. Smith, Director General, Atmospheric Environment Service, Environment Canada; William Teron, former Chairman, Canada Mortgage and Housing Corporation; Max Vermij, Transport Canada; Mr. Ramsey Withers, Deputy Minister, Transport Canada; and John R. Woods, Executive Director, Standards Council of Canada.

In our review of the private sector, we dealt with representatives of several of the professions, and met in person with: Robert McKercher, President, Claude Thompson, Vice-President, and Robert Wells, Treasurer, of the Canadian Bar Association.

As well, we gathered, in a single place, all codes of conduct currently in use throughout the federal public service, including the codes (where they exist) for the Crown corporations. These were analyzed in relation to supplementary information obtained from government officials about the working of conflict of interest rules for which they have particular responsibility. These individuals are: Liliana I Birtz, General

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Counsel and Corporate Secretary, Canada Mortgage and Housing Corporation; Dr. Pierre Bois, President, Medical Research Council of Canada; J.P. Connell, Deputy Minister, Agriculture Canada; D.B. Dewar, Deputy Minister, Department of National Defence; Léo A. Dorais, Vice-Chairman and Secretary-General, National Museums of Canada; T.D. Finn, Executive Director, Security and Intelligence Transitional Group, Solicitor General Canada; Fred E. Gibson, Deputy Solicitor General, Solicitor General Canada; R.J. Giroux, Deputy Minister, Revenue Canada (Customs and Excise); R.M. Hammond, Superintendent, Department of Insurance Canada; J.H. Jennekens, President, Atomic Energy Control Board; W.A. Kennett, Inspector General of Banks, Department of Finance Canada; Larkin Kerwin, President, National Research Council of Canada; Maurice Lafontaine, Deputy Minister, Indian and Northern Affairs Canada; Gaêtan Lussier, Deputy Minister and Chairman, Employment and Immigration Canada; Hon. Donald S. Macdonald, Chairman, Royal Commission on the Economic Union and Development Prospects for Canada; J.A.H. Mackay, Deputy Minister, Public Works Canada; G.M. MacNabb, President, Natural Sciences and Engineering Research Council of Canada; G.W. McPherson, Chairman of the Board, Ports Canada; Robert C. Montreuil, Chairman, Canada Mortgage and Housing Corporation; Gordon Osbaldeston, Clerk of the Privy Council and Secretary to the Cabinet; W.R. Outerbridge, Chairman, National Parole Board; George Post, Deputy Minister, Department of Consumer and Corporate Affairs; Robert Rabinovitch, Deputy Minister, Department of Communications; David W. Slater, Chairman, Economic Council of Canada; Dr. Stuart L. Smith, Chairman, Science Council of Canada; and Gus Sonneveld, Acting Chairman, Livestock Feed Board of Canada.

From the Crown corporations who responded to our requests for information, we wish to thank: Elix H. Anderson, Chairman, Farm Credit Corporation Canada; H.A. Anderson, Chairman, Port Alberni Harbour Commission; Gordon Atherley, President and Chief Executive Officer, Canadian Centre for Occupational Health and Safety; Jacques Auger, President and Chief Executive Officer, Ports Canada; G.A. Berger, Assistant Deputy Minister, Operations Sector, Supply and Services Canada and President, Crown Assets Disposal Corporation; Laurent A. Bergeron, President, Canadian Arsenals Limited; A.G. Bland, President, Defence Construction Canada; R.L. Boileau, Manager, Research and Administration, Canadian National; Chris Brown, Chairman, Fraser River Harbour Commission; Ian Brown, General Manager, Toronto Harbour Commissioners; Guy Coderre, Vice-President of Human Resources and Administration, Canadian Broadcasting Corporation; Howard E. Cohen, General Manager, Harbourfront Corporation; George W. Colquhoun, Port Manager, North Fraser Harbour Commission; Jean-Claude Delorme, President and Chief Executive Officer, Teleglobe Canada; James Donnelly, President, Atomic Energy of

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Canada Limited; J.T. Dunn, President and General Manager, Freshwater Fish Marketing Corporation; Arthur F. Earle, Advisor to the President, Canada Development Investment Corporation; W.H. Hopper, Chairman and Chief Executive Officer, Petro-Canada; Gorse Howarth, President, Canadian Commercial Corporation; R.A. Hubber-Richard, Chairman, Pacific Pilotage Authority Canada; W.E. Jarvis, Chief Commissioner, The Canadian Wheat Board; A.D. Latter, Chairman, Atlantic Pilotage Authority; Guy A. Lavigueur, President, Federal Business Development Bank; D.J.A. MacSween, Director General, National Arts Centre; Wilfrid Ménard, Secretary, Laurentian Pilotage Authority Canada; P. Morrison, Corporate Secretary, Northern Canada Power Commission; W.A. O'Neil, President, St. Lawrence Seaway; Francine Vallée Ouellet, Secretary of the Company, Air Canada; Ed Provost, Chairman, Canadian Film Development Corporation; Marion Ricci, Manager, Presidential Secretariat, Canadian Centre for Occupational Health and Safety; J. Smith, Chairman, Northern Canada Power Commission; J.W. Snell, Corporate Secretary, The Canadian Wheat Board; Fernand Tremblay, Chairman, National Battlefields Commission; Michael Warren, President and Chief Executive Officer, Canada Post Corporation; and William E. Wells, President, Canadian Saltfish Corporation.

Our Executive Director, Mr. Boyer, attended the fourth annual conference of the Office of the Government Ethics in Washington, D.C. on October 4, 1983, and the fifth annual conference of the Council on Governmental Ethics Laws in Montgomery, Alabama December 7 to 9, 1983, and obtained valuable information on the American experience and different approaches in dealing with conflict of interest problems. Mr. Boyer, accompanied by Assistant Deputy Registrar General Robert Boyle, also visited and interviewed Allan Gotlieb, Canadian Ambassador and a number of U.S. officials in Washington, including Mr. David Martin, Director of the Office of Government Ethics, Washington, and members of his staff; and His Honour Judge Walter B. Tamm, Chairman of the United States Judicial Ethics Committee. Jane S. Ley, staff attorney with the Office of Government Ethics provided considerable information and advice, as well as contacts with other government ethics officials in a number of States.

We also wish to acknowledge the willingness with which a number of State officials were forthcoming with materials on their laws and policies, including: R. Roth Judd, Executive Director, State of Wisconsin Ethics Board; Gordon B. Nash Jr., Chairman of the Illinois Board of Ethics; Lawrence A. Gonzalez, Executive Director, State of Florida Commission on Ethics; Susan M. Harrigan, State of California Political Fair Practices Commission; Richard J. Murphy, Director, State of New Jersey Executive Commission on Ethical Standards; Scott A. Weiner, Executive Director, State of New Jersey Election Law Enforcement

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Commission; Melvin G. Cooper, Executive Director, State Ethics Commission, Alabama; Catherine O.Y. Chang, Executive Director, State Ethics Commission, Hawaii.

At the provincial level, we have received assistance from a number of officials responsible for, or knowledgeable about, conflict of interest policy including Warren Bailie, Ontario's Chief Election Officer and an executive member of the Council on Governmental Ethics Laws; Gordon H. Aiken, Q.C., Chairman of the Ontario Commission on Election Contributions and Expenses; Robert J. Fleming, director of Administration of the Ontario Legislature; Pierre-F. Côté, C.R., Le Directeur général des élections et Président de la Commission de la représentation électorale du Québec.

Other provincial officals particuarly helpful in sending us information on conflict of interest laws and policies currently in force at both the provincial and municipal levels included: Hon. A.R. (Pete) Adam, Minister of Municipal Affairs, Province of Manitoba; Louis Bernard, General Secretary of the Executive Council, Government of Saskatchewan; Rosalie Curran, Secretary, Department of Municipal Affairs, Government of Newfoundland and Labrador; W.S. Deacon, Intergovernmental Relations Officer, Executive Council Office, Yukon Government; George de Rappard, Deputy Minister, Executive Council, Province of Manitoba; J.M. Fleming, Director, Municipal Services Branch, Alberta Municipal Affairs; Dave Gairns, Director of Municipal Services, Department of Municipal and Community Affairs, Yukon Government; Gerald B. Hawkins, Director, Municipal Services Branch, Department of Municipal Affairs, New Brunswick; David W. Jennings, Director of Labour Relations, Department of Treasury Board, Government of New Brunswick; Norm Macleod, Chief, Municipal Affairs Division, Northwest Territories Local Government; Harry A. Nason, Clerk of the Executive Council and Secretary to Cabinet, Government of New Brunswick; John H. Parker, Commissioner, Government of the Northwest Territories; Judith Robertson, Management Policy Advisor, Administrative Management Section, Municipal Management Policy Branch, Ministry of Municipal Affairs and Housing, Government of Ontario; Marilyn T. Singer, Executive Secretary to Minister, Department of Municipal Affairs, Province of Nova Scotia; H.D. Spray, Deputy Minister, Executive Council Office, Yukon Government; Edward Stewart, Clerk of the Executive Council, Government of Ontario; David A. Vardy, Clerk of the Executive Council and Secretary to the Cabinet, Government of Newfoundland; Tor K. Veltheim, Chairman, Saskatchewan Public Service Commission, Government of Saskatchewan; and Blenus Wright, Assistant Deputy Attorney General, Ministry of the Attorney General, Government of Ontario.

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SCHEDULE B

Government Departments and Organizations Having Supplemental Codes

(Note: Since we compiled the codes for these departments, governmental reorganization has resulted in several of the following being combined.)

Agricultural Stabilization Board
Atomic Energy Control Board
Bureau of Pensions Advocates
Canada Employment and Immigration Commission
Canadian Dairy Commission
Canadian Grain Commission
Canadian Human Rights Commission
Canadian Intergovernmental Conference Secretariat
Canadian International Development Agency
Canadian Livestock Feed Board
Canadian Penitentiary Service (Correctional Service Canada)
Canadian Pension Commission
Canadian Radio-television and Telecommunications Commission
Canadian Transport Commission
Communications Security Establishment
Department of Agriculture
Department of Communications
Department of Consumer and Corporate Affairs
Department of Employment and Immigration
Department of Energy, Mines and Resources
Department of External Affairs
Department of Finance
Department of Fisheries and Oceans
Department of Indian Affairs and Northern Development
Department of Industry, Trade and Commerce
Department of Justice
Department of Labour
Department of National Defence (civilian)*
Department of National Health and Welfare
Department of National Revenue (Customs and Excise)
Department of National Revenue (Taxation)
Department of Public Works
Department of Regional Economic Expansion
Department of Supply and Services
Department of the Environment
Department of the Secretary of State of Canada
Department of the Solicitor General
Department of Transport
Department of Veterans Affairs
Director of Soldier Settlement

*The Department of National Defence also has a supplemental code for members of the Canadian Armed Forces.

Economic Council of Canada
Energy Supplies Allocation Board
Federal-Provincial Relations Office
Fisheries and Oceans Research Advisory Council
Fisheries Prices Support Board
Foreign Investment Review Agency
Immigration Appeal Board
Law Reform Commission of Canada
Ministry of State for Economic Development
Ministry of State for Science and Technology
Ministry of State for Social Development
National Capital Commission
National Energy Board
National Film Board
National Library of Canada
National Museums of Canada
National Research Council of Canada
Northern Canada Power Commission
Northern Pipeline Agency
Office of the Auditor General of Canada
Office of the Governor General's Secretary
Office of the Superintendent of Bankruptcy
Pension Review Board
Prairie Farm Rehabilitation Administration
Privy Council Office
Public Archives of Canada
Public Service Staff Relations Board
Registry of the Federal Court of Canada
Restrictive Trade Practices Commission
Royal Canadian Mounted Police (civilian)
Social Sciences and Humanities Research Council of Canada
Statistics Canada
Statute Revision Commission
Supreme Court, Staff of
Tariff Board
Tax Review Board (Tax Court of Canada)
Treasury Board (Office of the Comptroller General)
Treasury Board (Secretariat)
Veterans Land Act, The Director
War Veterans Allowance Board

Crown Corporations Having Supplemental Codes

Air Canada
Atomic Energy of Canada Limited
Bank of Canada
Canada Council
Canada Development Investment Corporation
Canada Mortgage and Housing Corporation
Canada Post Corporation
Canadian Broadcasting Corporation
Canadian Centre for Occupational Health and Safety

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Canadian Commercial Corporation
Canadian Film Development Corporation
Canadian National Railway Company
Canadian Patents and Development Limited
Canadian Wheat Board
Cape Breton Development Corporation
Crown Assets Disposal Corporation
Defence Construction (1951) Limited
Eldorado Nuclear Limited
Export Development Corporation
Farm Credit Corporation
Federal Business Development Bank
Freshwater Fish Marketing Corporation
International Development Research Center
Laurentian Pilotage Authority
National Arts Centre Corporation
National Battlefields Commission
Northern Canada Power Commission
Oshawa Harbour Commission
Petro Canada
Ports Canada
The St. Lawrence Seaway Authority

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SCHEDULE C

A. CRIMINAL CODE PROVISIONS

Section 108 Bribery of Judicial Officers, etc.

108. (1) Every one who

(a) being the holder of a judicial office, or being a member of the Parliament of Canada or of a legislature, corruptly

(i) accepts or obtains,

(ii) agrees to accept, or

(iii) attempts to obtain,

any money, valuable consideration, office, place or employment for himself or another person in respect of anything done or omitted or to be done or omitted by him in his official capacity, or

(b) gives or offers corruptly to a person who holds a judicial office, or is a member of the Parliament of Canada or of a legislature, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by him in his official capacity for himself or another person,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) No proceedings against a person who holds a judicial office shall be instituted under this section without the consent in writing of the Attorney General of Canada.

Section 110 Frauds Upon the Government

110. (1) Every one commits an offence who

(a) directly or indirectly

(i) gives, offers, or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of any official, or

(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,

a loan, reward, advantage or benefit of any kind as

consideration for cooperation, assistance, exercise of influence or an act or ommission in connection with

(iii) the transaction of business with or any matter of business relating to the government, or

(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

(b) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind upon an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies upon him;

(c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies upon him;

(d) having or pretending to have influence with the government or with a minister of the government or an official, demands, accepts or offers or agrees to accept for himself or another person a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (a) (iii) or (iv), or

(ii) the appointment of any person, including himself, to an office;

(e) offers, gives or agrees to offer or give to a minister of the government or an official a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

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(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) the appointment of any person, including himself, to an office; or

(f) having made a tender to obtain a contract with the government

(i) gives, offers or agrees to give to another person who has made a tender, or to a member of his family, or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or

(ii) demands, accepts or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind as consideration for the withdrawal of his tender.

(2) Every one commits an offence who, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, directly or indirectly subscribes, gives, or agrees to subscribe or give, to any person any valuable consideration

(a) for the purpose of promoting the election of a candidate or a class or party of candidates to the Parliament of Canada or a legislature, or

(b) with intent to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in the Parliament of Canada or a legislature.

(3) Every one who commits an offence under this section is guilty of an indictable offence and is liable to imprisonment for five years.

Section 297: Public Servant Refusing to Deliver Property

297. Every one who, being or having been employed in the service of Her Majesty in right of Canada or in right of a province, or in the service of a municipality, and entrusted by virtue of that employment with the receipt, custody, management or control of anything, refuses or fails to deliver it to a person who is authorized to demand it and does demand it, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Section 357: False Return by Public Officer

357. Every one who, being entrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes a false statement or return of

(a) any sum of money collected by him or entrusted to his care, or

(b) any balance of money in his hands or under his control,

is guilty of an indictable offence and is liable to imprisonment for five years.

Section 682: Public Office Vacated on Conviction

(1) Where a person is convicted of an indictable offence for which he is sentenced to imprisonment for a term exceeding five years and holds, at the time he is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.

(2) A person to whom subsection (1) applies is, until he undergoes the punishment imposed upon him or the punishment substituted therefore by competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of the Parliament of Canada or of a legislature or of exercising any right of suffrage.

682. (3) No person who is convicted of an offence under section 110, ...has, after that conviction, capacity to contract with Her Majesty or to receive any benefit under a contract between Her Majesty and any other person or to hold office under Her Majesty.

(3.1) A person to whom subsection (3) applies may, at any time before a pardon is granted to him under section 4 of the Criminal Records Act, apply to the Governor in Council for the restoration of one or more of the capacities lost by him by virtue of that subsection.

(3.2) Where an application is made under subsection (3.1), the Governor-in-Council may order that the capacities lost by the applicant by virtue of subsection (3) be restored to him in whole or in part and subject to such conditions as he considers desirable in the public interest.

(4) Where a conviction is set aside by competent authority any disability imposed by this section is removed.

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B. CRIMINAL OFFENCES IN OTHER STATUTES

(1) Immigration Act, 1976

Section 98: Offences respecting immigration officers and adjudicators

98. Every person who

(a) being an immigration officer or an adjudicator, wilfully makes or issues any false document or statement in respect of any matter relating to his duties under this Act, or accepts, agrees to accept or induces or assists any other person to accept any bribe or other benefit in respect of any matter relating to his duties under this Act or otherwise wilfully fails to perform his duties under this Act,

(b) being an immigration officer or an adjudicator, contravenes any provision of this Act or the regulations or knowingly induces, aids or abets or attempts to induce, aid or abet any other person to do so,

(c) gives, offers or promises to give any bribe or consideration of any kind to, or makes any agreement or arrangement with, an immigration officer or an adjudicator to induce him in any way not to perform his duties under this Act,

(d) not being an immigration officer or an adjudicator, impersonates or holds himself out to be an immigration officer or an adjudicator, or takes or uses any name, title, uniform or description or otherwise acts in any manner that may reasonably lead any person to believe that he is an immigration officer or an adjudicator, or

(e) obstructs or impedes an immigration officer or an adjudicator in the performance of his duties under this Act,

is guilty of an offence and is liable,

(f) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding five years or to both, or

(g) on summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

Section 99: General Punishment

99. Every person who knowingly contravenes any provision of this Act or the regulations or any order or direction lawfully made or given thereunder for which no punishment is elsewhere provided in this Act is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) Financial Administration Act, Part XI

Section 92: Offences

92. Every officer or person acting in any office or employment connected with the collection, management or disbursement of public money who

(a) receives any compensation or reward for the performance of any official duty, except as by law prescribed,

(b) conspires or colludes with any other person to defraud Her Majesty, or makes opportunity for any person to defraud Her Majesty,

(c) designedly permits any violation of the law by any other person,

(d) wilfully makes or signs any false entry in any book, or wilfully makes or signs any false certificate or return in any case in which it is his duty to make an entry, certificate or return,

(e) having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against Her Majesty, under any revenue law of Canada, fails to report, in writing, such knowledge or information to his superior officer, or

(f) demands or accepts or attempts to collect, directly or indirectly, as payment or gift or otherwise, any sum of money, or other thing of value, for the compromise, adjustment or settlement of any charge or complaint for any violation or alleged violation of law,

is guilty of an indictable offence, and is liable on conviction to a fine not exceeding five hundred dollars, and to imprisonment for any term not exceeding five years.

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Section 93: Bribes

93. Every person who

(a) promises, offers, gives any bribe to any officer or any person acting in any office or employment connected with the collection, management or disbursement of public money, with intent

(i) to influence his decision or action on any question or matter that is then pending, or may, by law, be brought before him in his official capacity, or

(ii) to influence such officer or person to commit, or aid or abet in committing any fraud on the revenue, or to connive at, collude in, or allow or permit any opportunity for the commission of any such fraud, or

(b) accepts or receives any such bribe,

is guilty of an indictable offence, and is liable on conviction to a fine not exceeding three times the amount so offered or accepted, and to imprisonment for any term not exceeding five years.

(3) Unemployment Insurance Act, Part V

Section 114: Confidential information

114. Information, written or oral, obtained by the Commission or the Department of Employment and Immigration from any person under this Act or any regulation thereunder shall be made available only to the employees of the Commission or the said Department in the course of their employment and such other persons as the Minister deems advisable, and neither the Commission, the said Department, nor any of their employees is compellable to answer any question concerning such information, or to produce any records or other documents containing such information as evidence in any proceedings not directly concerned with the enforcement or interpretation of this Act, or the regulations.

Section 123: Contravention of Act

123. (1) Every person who contravenes or fails to comply with any provision of this Act or the regulations is guilty of an offence.

Section 124: Offences generally

124. Every person who is guilty of an offence under this Act for which no penalty is provided is liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months or to both.

(4) Income Tax Act, Part XV

Section 241: Communication of Information

241. (1) Except as authorized by this section, no official or authorized person shall

(a) knowingly communicate or knowingly allow to be communicated to any person any information obtained by or on behalf of the Minister for the purposes of this Act, or

(b) knowingly allow any person to inspect or to have access to any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act.

(9) Every person

(a) who, being an official or authorized person, contravenes subsection (1), or

(b) to whom information has been provided pursuant to subsection (4) who uses, communicates or allows to be communicated such information for any purpose other than for which it was provided, is guilty of an offence and is liable on summary conviction to a fine not exceeding $1,000 or to imprisonment for a term not exceeding 2 months or to both such fine and imprisonment.

C. CIVIL LIABILITY UNDER CERTAIN STATUTES

(1) Financial Administration Act, Part XI

Section 89: Notice to persons failing to pay over public money

89. (1) Whenever the Receiver General has reason to believe that any person

(a) has received money for Her Majesty and has not duly paid it over,

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(b) has received money for which he is accountable to Her Majesty and has not duly accounted for it, or

(c) has in his hands any public money applicable to any purpose and has not duly applied it,

the Receiver General may cause a notice to be served on such person, or on his representative in case of his death, requiring him within such time from the service of the notice as may be named therein, duly to pay over, account for, or apply such money, as the case may be, and to transmit to the Receiver General proper vouchers that he has done so.

(2) Where a person has failed to comply with a notice served on him under subsection (1) within the time stated therein, the Receiver General shall state an account between such person and Her Majesty, showing the amount of the money not duly paid over, accounted for or applied, as the case may be, and, in the discretion of the Receiver General, charging interest on the whole or any part thereof at the rate of five per cent per annum from such date as the Receiver General may determine, and in any proceedings for the recovery of such money a copy of the account stated by the Receiver General, certified by him, is evidence that the amount stated therein, together with interest, is due and payable to Her Majesty, without proof of the signature of the Receiver General or his official character, and without further proof thereof, and such amount and interest may be recovered as a debt due to Her Majesty.

Section 90: Evidence

90. Where it appears

(a) by the books or accounts kept by or in the office of any person employed in the collection or management of the revenue,

(b) in any accounting by such person, or

(c) by his written acknowledgement or confession,

that such person, has, by virtue of his office or employment, received money belonging to Her Majesty and has refused or neglected to pay over such money to the proper persons at the proper times, an affidavit deposing to such facts, taken by any person having knowledge thereof, shall, in any proceedings for the recovery of such money, be received in evidence and is prima facie proof of the facts stated therein.

Section 91: Liability for loss

91. Where by reason of any malfeasance, wilful neglect of duty or gross negligence by any person employed in collecting or receiving any public money, any sum of money is lost to Her Majesty, that person is accountable for such sum as if he had collected and received it and it may be recovered from him as if he had collected and received it.

D. STATUTORY PROVISIONS ADDRESSING CONFLICT OF INTEREST MATTERS

(1) National Energy Board Act

The following is the full text of section 3(5) of the National Energy Board Act which is cited in the report:

> 3.(5) A person is not eligible to be appointed or to continue as a member of the Board if he is not a Canadian citizen or if as owner, shareholder, director, officer, partner or otherwise, he is engaged in the business of producing, selling, buying, transmitting, exporting, importing or otherwise dealing in hydrocarbons or power or if he holds any bond, debenture or other security of a company.

E. CONFLICT OF INTEREST PROVISIONS RELATING TO MEMBERS OF PARLIAMENT

(1) Standing Orders of the House of Commons

No. 14 No member is entitled to vote upon any question in which he or she has a direct pecuniary interest, and the vote of any member so interested will be disallowed.

No. 83 The offer of any money or other advantage to any member of this House, for the promoting of any matter whatsoever depending or to be transacted in Parliament, is a high crime and misdemeanour, and tends to the subversion of the constitution.

No. 84 If it shall appear that any person has been elected and returned a member of this House, or has endeavoured so to be, by bribery or any other corrupt practices, this House will proceed with the utmost severity against all such persons as shall have been wilfully concerned in such bribery or other corrupt practices.

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(2) Beauchesne's Parliamentary Rules and Forms (1978)

Section 824: Offer of Bribe

824. Standing Order 83 is founded upon a resolution passed by Parliament in England on May 2, 1695. In the spirit of this resolution, the offer of a bribe in order to influence a Member in any of the proceedings of the House, or of a committee, has been treated as a breach of privilege, being an insult not only to the Member himself but also to the House. Sir Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament (19th ed., 1976), p. 149.

Section 825: Acceptance of Bribe or Fees

825. (1) The acceptance of a bribe by a Member is an offence under s.108 of the Criminal Code, R.S.C. 1970, c.C-34.

(2) The acceptance of fees by Members for professional services connected with any proceedings or measures of Parliament, is also forbidden under the spirit of this rule, nor is it consistent with parliamentary or professional usage for a Member to advise as a paid counsel upon any private bill before Parliament. Sir John Bourinot, Parliamentary Procedure and Practice in the Dominion of Canada (4th ed., 1916), pp. 57-8.

Section 826: Corrupt Electoral Practices

826. Matters concerning corrupt practices during elections are the subject of ss.65 to 90 of the Canada Elections Act, R.S.C. 1970, c.14, (1st Supp.).

(3) Senate and House of Commons Act

Independence of Parliament

(This subsection (3) is also known as Appendix I to the Conflict of Interest Guidelines for Ministers of the Crown in Schedule D, A., of this report)

Members of the House of Commons

10. Except as hereinafter specially provided,

(a) no person accepting or holding any office, commission or employment, permanent or temporary, in the service of the Government of Canada, at the nomination of the Crown or at the nomination of any of the officers of the

Government of Canada, to which any salary, fee, wages, allowance, emolument, or profit of any kind is attached, and

(b) no sheriff, registrar of deeds, clerk of the peace, orcounty crown attorney in any of the provinces of Canada,

is eligible as a member of the House of Commons, or shall sit or vote therein.

11. Nothing in section 10 renders ineligible any person holding any office, commission or employment, permanent or temporary, in the service of the Government of Canada, at the nomination of the Crown, or at the nomination of any of the officers of the Government of Canada, as a member of the House of Commons, or disqualifies him from sitting or voting therein, if, by his commission or other instrument of appointment, it is declared or provided that he shall hold such office, commission or employment without any salary, fees, wages, allowances, emolument or other profit of any kind, attached thereto.

12. Nothing in this Act renders ineligible or disqualifies any person as a member of the House of Commons or to sit or vote therein by reason of his being

(a) a member of Her Majesty's forces while he is on active service as a consequence of war, or

(b) a member of the reserve force of the Canadian Forces who is not on full-time service other than active service as a consequence of war.

13. Notwithstanding anything in this Act, a member of the House of Commons shall not vacate his seat by reason only of his acceptance of an office of profit under the Crown, if that office is an office the holder of which is capable of being elected to, or sitting or voting in, the House of Commons.

14. A person is not, by this Act, rendered ineligible as a member of the House of Commons or disqualified from sitting or voting in the House of Commons by reason only of his acceptance of travelling expenses paid out of public moneys of Canada where the travel is undertaken at the request of the Governor-in-Council on the public business of Canada.

15. A member of the Queen's Privy Council for Canada is not, by this Act, rendered ineligible as a member of the House of Commons or disqualified from sitting or voting in the House of Commons by reason only that he

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(a) holds an office for which a salary is provided in section 4 or 5 of the Salaries Act and receives that salary, or

(b) is a Minister of State, other than a Minister of State referred to in section 5 of the Salaries Act, or a Minister without Portfolio and receives a salary in respect of that position,

if he is elected while he holds that office or position or is a member of the House of Commons at the date of his nomination by the Crown for that Office or position.

16. No person, directly or indirectly, alone or with any other, by himself or by the interposition of any trustee or third party, holding or enjoying, undertaking or executing any contract or agreement, expressed or implied, with or for the Government of Canada on behalf of the Crown, or with or for any of the officers of the Government of Canada, for which any public money of Canada is to be paid, is eligible as a member of the House of Commons, or shall sit or vote in the said House.

17. If any member of the House of Commons accepts any office or commission, or is concerned or interested in any contract, agreement, service or work that, by this Act, renders a person incapable of being elected to, or of sitting or voting in the House of Commons, or knowingly sells any goods, wares or merchandise to, or performs any service for the Government of Canada, or for any of the officers of the Government of Canada, for which any public money of Canada is paid or to be paid, whether such contract, agreement or sale is expressed or implied, and whether the transaction is single or continuous, the seat of such member is thereby vacated, and his election is thenceforth void.

18. (1) If any person disqualified or by this Act declared incapable of being elected to, or of sitting or voting in the House of Commons, or if any person duly elected, who has become disqualified to continue to be a member or to sit or vote, under section 17, nevertheless sits or votes, or continues to sit or vote therein, he shall thereby forfeit the sum of two hundred dollars for each and every day on which he so sits or votes.

(2) Such sum is recoverable from him by any person who sues for the same in any court of competent civil jurisdiction in Canada.

19. Sections 16, 17 and 18 extend to any transaction or act begun and concluded during a recess of Parliament.

20. (1) In every contract, agreement or commission to be made, entered into or accepted by any person with the Government of Canada, or any of the departments or officers of the Government of Canada, there shall be inserted an express condition, that no member of the House of Commons shall be admitted to any share or part of such contract, agreement or commission, or to any benefit to arise thereform.

(2) In case any person, who has entered into or accepted, or who shall enter into or accept any such contract, agreement or commission, admits any member or members of the House of Commons, to any part or share thereof, or to receive any benefit thereby, every such person shall, for every such offence, forfeit and pay the sum of two thousand dollars, recoverable with costs in any court of competent jurisdiction by any person who sues for the same.

21. This Act doe not extend to disqualify any person as a member of the House of Commons by reason of his being

(a) a shareholder in any incorporated company having a contract or agreement with the Government of Canada, except any company that undertakes a contract for the building of any public work;

(b) a person on whom the completion of any contract or agreement, expresssed or implied, devolves by descent or limitation, or by marriage, or as devisee, legatee, executor or administrator, until twelve months have elapsed after the same has so devolved on him; or

(c) a contractor for the loan of money or of securities for the payment of money to the Government of Canada under the authority of Parliament, after public competition, or respecting the purchase or payment of the public stock or debentures of Canada, on terms common to all persons.

Members of the Senate

22. (1) No person, who is a member of the Senate, shall directly or indirectly, knowingly and wilfully be a party to or be concerned in any contract under which the public money of Canada is to be paid.

(2) If any person, who is a member of the Senate, knowingly and wilfully becomes a party to or concerned in any such contract, he shall forfeit the sum of two hundred dollars for each and every day during which he continues to be such party or so concerned.

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(3) Such sum is recoverable from him by any person who sues for the same, in any court of competent jurisdiction in Canada.

(4) This section does not render any senator liable for such penalties, by reason of his being a shareholder in any incorporated company having a contract or agreement with the Government of Canada, except any company that undertakes a contract for the building of any public work.

(5) This section does not render any senator liable for such penalties by reason of his being, or having been, a contractor for the loan of money or of securities for the payment of money to the Government of Canada under the authority of Parliament, after public competition, or by reason of his being, or having been, a contractor respecting the purchase or payment of the public stock or debentures of Canada, on terms common to all persons.

Members of the Senate and the House of Commons

23. (1) No member of the Senate or of the House of Commons shall receive or agree to receive any compensation, directly or indirectly, for services rendered, or to be rendered, to any person, either by himself or another, in relation to any bill, proceeding, contract, claim, controversy, charge, accusation, arrest or other matter before the Senate or the House of Commons, or before a committee of either House, or in order to influence or to attempt to influence any member of either House.

(2) Every member of the Senate offending against this section is liable to a fine of not less than one thousand dollars and not more than four thousand dollars; and every member of the House of Commons offending against this section is liable to a fine of not less than five hundred dollars and not more than two thousand dollars, and shall for five years after conviction of such offence, be disqualified from being a member of the House of Commons, and from holding any office in the public service of Canada.

(3) Any person who gives, offers, or promises to any such member any compensation for such services as aforesaid, rendered or to be rendered, is guilty of an indictable offence, and liable to one years's imprisonment and to a fine of not less than five hundred dollars and not more than two thousand dollars.

Limitation of Actions

24. No person is liable to any forfeiture or penalty imposed by this Act, unless proceedings are taken for the recovery thereof within twelve months after such forfeiture or penalty has been incurred.

F. PROVISIONS OF THE PUBLIC SERVICE EMPLOYMENT ACT

Political Partisanship

32. (1) No deputy head and, except as authorized under this section, no employee, shall

(a) engage in work for, on behalf of or against a candidate for election as a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories, or engage in work for, on behalf of or against a political party; or

(b) be a candidate for election as a member described in paragraph (a).

(2) A person does not contravene subsection (1) by reason only of his attending a political meeting or contributing money for the funds of a candidate for election as a member described in paragraph (1)(a) or money for the funds of a political party.

(3) Notwithstanding any other Act, upon application made to the Commission by an employee the Commission may, if it is of the opinion that the usefulness to the Public Service of the employee in the position he then occupies would not be impaired by reason of his having been a candidate for election as a member described in paragraph (1)(a), grant to the employee leave of absence without pay to seek nomination as a candidate and to be a candidate for election as such a member, for a period ending on the day on which the results of the election are officially declared or on such earlier day as may be requested by the employee if he has ceased to be a candidate.

(4) Forthwith upon granting any leave of absence under subsection (3), the ommission shall cause notice of its action to be published in the Canada Gazette.

(5) An employee who is declared elected as a member described in paragraph (1)(a) thereupon ceases to be an employee.

(6) Where any allegation is made to the Commission by a person who is or has been a candidate for election as a member described in paragraph (1)(a), that a deputy head or employee has contravened subsection (1), the allegation shall be referred to a board established by the Commission to conduct an inquiry at which the person making the allegation and the deputy head or employee

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concerned, or their representatives, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission,

(a) in the case of a deputy head, shall report the decision to the Governor-in-Council who may, if the board has decided that the deputy head has contravened subsection (1), dismiss him; and

(b) in the case of an employee, may, if the board has decided that the employee has contravened subsection (1), dismiss the employee.

(7) In the application of subsection (6) to any person, the expression "deputy head" does not include a person for whose removal from office, otherwise than by the termination of his appointment at pleasure, express provision is made by this or any other Act.

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SCHEDULE D

A. CONFLICT OF INTEREST GUIDELINES FOR MINISTERS OF THE CROWN

I. Principles

1) The onus for preventing real, apparent or foreseeable conflicts of interest rests with the individual.

2) Ministers must perform and appear to perform their official responsibilities and arrange their private affairs in a manner that will conserve and enhance public confidence and trust in government and that will prevent conflicts of interest from arising.

3) Ministers must not take advantage or appear to take advantage of their official positions, or of information obtained in the course of their official duties that is not generally available to the public.

The purpose of these Guidelines is to assist Ministers in observing these principles and in maintaining the high standard of conduct expected of them. As the Guidelines are general in nature, conforming to the letter of them may not afford complete protection for individual Ministers in all cases. Each Minister is therefore responsible for taking whatever additional action may be necessary to ensure that conflicts of interest are avoided.

II. Prohibited Activities

Ministers upon appointment, or as soon as possible thereafter, shall cease to:

1) engage in the practice of a profession or the management or operation of any business or commercial activity, or in the management of assets except exempt or discloseable assets;

2) serve as paid consultants;

3) retain or accept directorships or offices in commercial corporations. Although it could be proper in some circumstances for Ministers to retain or accept directorships or offices in organizations of a philanthropic or charitable character, great care must always be taken to prevent conflicts of interest from arising. Offers

of directorships or offices in philanthropic or charitable organizations in receipt of federal public funds should be refused;

4) serve actively as members in unions or professional associations.

Each Minister will provide to the Assistant Deputy Registrar General (ADRG) for disclosure in the Public Registry information concerning the partnerships, directorships and corporate executive positions held by them during the two years preceding their appointment. These disclosures will provide sufficient information to identify the nature of the business involved and of the responsibilities carried.

III. Avoidance of Preferential Treatment

Ministers shall not accord preferential treatment in relation to any official matter to relatives or friends or to organizations in which their relatives or friends have an interest.

Ministers must also take care to avoid placing, or appearing to place, themselves under an obligation to any person or organization which might profit from special consideration or favour on their part.

IV. Gifts

Ministers shall disclose in the Public Registry any personal gift or other benefit of a value exceeding two hundred dollars which they receive from any person not connected with them by blood relationship, marriage or adoption, together with the name and address of the donor. Official gifts and hospitality received from other governments and hospitality received from personal friends are not subject to this rule. All gifts or benefits exceeding two hundred dollars in value, other than official gifts or benefits, are to be declared to the ADRG within thirty days of their receipt for disclosure in the Public Registry.

V. Arrangements with Respect to Assets

At the time of their appointment to the Cabinet or upon the coming into force of these guidelines, Ministers shall make a full report to the Prime Minister, through the Assistant Deputy Registrar General (ADRG), of all their assets and liabilities. These reports will be updated by annual reports submitted by Ministers through the same channel, indicating changes in the

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assets, other than exempt assets, owned directly by them. These annual reports will include information about changes in the liabilities owed by Ministers.

A Exempt Assets

There are no requirements of public disclosure or restrictions on dealing with property which is for the personal use of Ministers and their families or with other assets not of a commercial character ("exempt assets"). Exempt assets include: residences and recreational property used or intended for use by Ministers or their families; household goods and personal effects; automobiles; boats and other means of transport for personal use; and works of art. They also include cash and deposits (but do not include cash and deposits in foreign currency held for investment or speculative purposes); Canada and provincial savings bonds; registered retirement savings plans that are not self-administered; self-administered registered retirement savings plans composed exclusively of exempt assets; registered home ownership savings plans; investments in open ended mutual funds; guaranteed investment certificates and similar financial instruments; income averaging and other annuities; accrued pension rights; life insurance policies; money owed by a previous employer, client or partnership; personal loans to any individual connected with a Minister by blood relationship, marriage or adoption; and personal loans not in excess of $5,000 to any individual not connected with a Minister by blood relationship, marriage or adoption.

B Discloseable Assets

Ministers may elect to disclose in the Public Registry the following assets owned by them when these assets are of such a nature that they are unlikely to give rise to a conflict of interest:

1) ownership interests in family businesses, and in companies whose stocks and shares are not traded publicly, which do not contract with the government, which are of a local character, and which do not own or control shares of public companies;

2) farms;

3) real property other than exempt property not normally for the minister's or his family's personal use and which is unlikely to create a conflict of interest;

4) beneficial ownership of the assets of trusts other than blind trusts of which the administration is carried out at arm's length.

If Ministers do not elect to disclose non-conflicting assets in the Public Registry, these assets must be treated as "controlled assets". Initial reports of such assets shall be made by the Minister to the ADRG within 60 days of the Minister's appointment to the Cabinet, for the purpose of disclosure in the Public Registry. Information about any sale, purchase or acquisition through other means of assets of this character made subsequent to any initial report must be provided by the Minister to the ADRG within 30 days after the transaction has been completed for disclosure in the Public Registry. The information provided in these initial and subsequent disclosures will be open to public examination.

C Controlled Assets

All assets other than exempt or discloseable assets owned by a Minister shall be considered controlled assets and shall be either sold in a normal arm's length transaction or placed in a blind trust. Ministers may not after the completion of any arrangements necessary to comply with the Guidelines, purchase, sell or retain any direct interest in any controlled asset. If Ministers should acquire controlled assets through inheritance or gift after their arrangements have been completed, this shall be reported to the Prime Minister and either sold or placed in a blind trust.

Controlled assets include:

1) publicly traded securities of corporations and governments;

2) interests in partnerships, proprietorships, joint ventures, private companies and family businesses which are not discloseable assets;

3) stock options except those of private companies referred to in item 1) under Discloseable Assets;

4) self-administered registered retirement savings plans, except those composed exclusively of exempt assets;

5) real property which is not an exempt or discloseable asset;

6) commodities, including metals, and foreign currency for speculative or investment purposes;

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7) interests in profit sharing plans;

8) loans that exceed $5,000 to individuals not connected with the Minister concerned by blood relationship, marriage or adoption.

1) Divestment - Selling

Ministers may sell controlled assets in a normal arm's length transaction but only for the purpose of complying with these Guidelines and within the time limits prescribed in them.

2) Divestment - Blind Trust

Controlled assets that are not sold must be placed in a blind trust. The following criteria shall be observed in establishing blind trusts to comply with these Guidelines:

1) title to all assets placed in trust must be transferred to the trustee(s);

2) all trustees of such trusts shall be individuals, corporations or firms that deal with the Minister at arm's length (as this term is defined in the Income Tax Act of Canada). This means that individuals connected with a Minister by blood relationship, marriage or adoption cannot serve as trustees;

3) while there shall be no limit on the number of trustees that may be appointed, every trust must have at least one "government designated trustee" (all trust companies in possession of a valid licence and designated investment dealers);

4) all decisions of the trustees of a blind trust must be approved by a majority of the trustees which majority must include the government designated trustee;

5) subject to the requirements of 2, 3 and 4 above, a Minister may appoint as many independent trustees as he wishes;

6) the terms of each instrument shall place on the trustee(s) a clear responsibility not to divulge to, or otherwise inform, directly or indirectly, the Minister of any matter concerning the assets in or the management of the trust, except as hereinafter provided;

7) the trustee(s) of each trust must be empowered to make all decisions concerning the management of the assets in the trust free of direct or indirect control or influence of direct or indirect control or influence by the Minister, and without informing, consulting with or seeking advice from the Minister;

8) each trust instrument shall provide that the trustee(s) must deliver annual statements to the minister that will permit the preparation of annual income tax returns, or compliance with any other legislation or legal requirements;

9) any trust instrument may provide that the Minister be informed of the total value of the trust fund at any time, but such information and the statements referred to in item 8) above, must not disclose to the Minister the identity, nature, or value of any of the assets in the trust;

10) the terms of any blind trust instrument may provide that the net income of the trust fund be paid to the Minister at such intervals as may be agreed with the trustee(s);

11) the Minister may request the trustee(s) to pay to him or her such part of the capital of the trust fund, in cash and not in specie, as he or she may direct;

12) the Minister may add capital to the trust at any time during the life of the trust.

NOTE: Ministers may name persons other than themselves as beneficiaries of their blind trust, in which event these criteria apply mutatis mutandis to Ministers and the beneficiaries.

Within the period stipulated in these Guidelines, a copy of any blind trust instrument entered into by a Minister for the purposes of these Guidelines must be provided to the ADRG.

The deadline for receipt of these instruments may be extended by the Prime Minister in special circumstances.

3) Holding Companies

In cases where Ministers have established holding companies for estate planning purposes, they may put their rights in such companies into a trust for retention. In such

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circumstances, the trustee may not dispose of or otherwise affect the rights placed in the trust. The Assistant Deputy Registrar General may serve as trustee of such trusts.

In establishing such trusts, Ministers may make arrangements to have third parties exercise their voting rights in relation to the shares in the holding company as long as such arrangements will not result in a conflict of interest. Ministers who have established such trusts may not be consulted or informed of the disposition of any assets owned by the holding company that would be considered to be controlled assets under the terms of these Guidelines.

VI. Executorships and Trusteeships

Ministers are to disclose to the Prime Minister through the ADRG, all executorships and trusteeships and are to take appropriate steps to avoid conflicts of interest that might arise from serving actively as executor or trustee.

VII. Spouses and Dependent Children

These Guidelines do not directly apply to spouses or dependent children of Ministers. It goes without saying that Ministers must not transfer their assets to their spouses or dependent children with a view to avoiding the requirements of these Guidelines. Ministers should also bear in mind their individual responsibility to prevent conflicts of interest, including those that might conceivably arise or appear to arise out of dealings in property or investments which are owned or managed in whole or in part, by their spouses or dependent children.

VIII. Administration

These Guidelines are administered on behalf of the Prime Minister by the Assistant Deputy Registrar General (ADRG). The ADRG will assist Ministers in complying with these Guidelines and will provide them with information and advice for this purpose.

Ministers must fully declare on a confidential basis their assets, liabilities and activities, including executorships and trusteeships, to the ADRG within 60 days of appointment to the Cabinet or of the coming into force of these Guidelines.

In order that the ADRG may assure Ministers that their trust instruments conform to the criteria set out in the guidelines and will be satisfactory to the Prime Minister, trust instruments are to be submitted to the ADRG before they are executed.

Ministers must complete all arrangements necessary to achieve full compliance within 120 days of appointment or of the coming into force of these Guidelines. Within this time period, Ministers must provide to the ADRG copies of duly executed trust instruments and public disclosures of previous activities, personal gifts or benefits and discloseable assets, as required, and a public document in which they will indicate in summary form the arrangements they have made to comply with these Guidelines. The public disclosures of previous activities, personal gifts or benefits and discloseable assets and the summary of arrangements made by a Minister will be open to examination by the general public in the Public Registry maintained by the ADRG.

If questions related to compliance with these Guidelines cannot be resolved between a Minister and the ADRG, the matter will be referred by the ADRG or the Minister concerned to an advisory committee composed of the Clerk of the Privy Council and the Prime Minister's Principal Secretary for an opinion. Questions regarding the application of the Guidelines to unusual situations will be referred to the Prime Minister through the advisory committee.

A Minister's conflict of interest arrangements will be considered complete when approved by the Prime Minister.

IX. Other Requirements

Conflict of Interest Rules for Parliamentarians

Ministers are subject, in addition to these Guidelines, to the provisions of the Senate and House of Commons Act as they apply to Senators and Members of Parliament. Attention is drawn, in particular, to the conflict of interest provisions of these Acts (Attached as Appendix I). These are reproduced in section E (3) of Schedule C of this report. They relate to incompatible offices, prohibited contracts with the government and prohibitions on fees received for influencing other Parliamentarians.

Post-Employment Guidelines

Ministers are also asked to comply with the Post-Employment Guidelines, attached as Appendix II.* These are reproduced in section B of this Schedule D which follows.

B. POST-EMPLOYMENT GUIDELINES FOR MINISTERS

The following is the text of the Post-Employment Guidelines for Ministers:

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A. Guidelines for Ministers

1) Ministers should not allow themselves to be influenced in their pursuit of their official duties by plans for or offers of outside employment:

a) Ministers should disclose to the Prime Minister all serious offers of positions outside Government service which in their judgement put them in a position of a real or apparent conflict of interest;

b) Ministers should not accept any offers of employment outside Government service without first informing the Prime Minister;

c) Ministers should, in seeking employment or an occupation outside Government service or in preparing themselves for commercial activities after they will have left Government service, ensure that these endeavours do not lead to real or apparent conflicts of interest or in any way interfere with their official duties.

2) In any official dealings with former office holders, Ministers must ensure that they do not provide grounds or the appearance of grounds for allegations of improper influence, privileged access or preferential treatment.

B. Guidelines Applying to Employment and Commercial Activities of Former Ministers

The following guidelines are pursuant to the principles set out in the Conflict of Interest Guidelines, and are to be applied in accordance with those principles and with the aim of protecting the individual liberty of former Ministers to the fullest extent possible.

These guidelines do not apply to former Ministers who remain in the Senate or House of Commons to the extent that they would impede the performance of their duties as Parliamentarians, but in such circumstances the former Minister must take care to follow the appropriate Parliamentary laws, rules and conventions relating to conflict of interest.

1) Within a period of two years of leaving office, ministers should not:

a) accept appointment to a board of directors of a commercial corporation which, as a matter of

course, was in a special relationship with the department or agency for which they were responsible on an ongoing basis during the last two years of their participation in the Ministry;

b) change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, transaction, case or other matter to which the Government of Canada is a party and in which they had a personal and substantial involvement on behalf of the Government during the last two years of their participation in the Ministry;

c) lobby for or on behalf of any person or commercial corporation before any department or agency for which they were responsible on an ongoing basis during the last two years of their participation in the Ministry.

2) Within the period of one year of leaving office, Ministers should not:

a) accept employment with a commercial corporation with which they had significant direct official dealings as Ministers during the last year of their participation in the Ministry;

b) change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, case, transaction or other matter which fell under their authority during the last year of their participation in the Ministry;

c) give counsel for commercial purposes concerning the programs or policies of the department or agency for which they were responsible on an ongoing basis, or with which they had a direct and substantial relationship during the last year of their participation in the Ministry;

NOTES: For these purposes "department or agency" includes Crown corporations but not quasi-judicial bodies. "Special relationship" in respect of paragraph 1(a) means regulation of the corporation by the department or agency, receipt by the corporation of subsidies, loans or other capital assistance from the department or agency, and

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contractual relationships between the corporation and the department or agency.

C. GUIDELINES FOR PARLIAMENTARY SECRETARIES

The text of the Prime Minister's letter to Parliamentary Secretaries is as follows:

> I am writing to bring to your attention the Government's concern with respect to conflicts of interest and to inform you of our policy as it relates to Parliamentary Secretaries.
>
> Our policy's fundamental principle is that the integrity and objectivity of all persons having public responsibilities must be beyond question at all times. We thus have a personal duty scrupulously to avoid any financial transactions and remunerated activities which might result in our receipt of undue benefit or place us in a position of real or apparent conflict of interest.
>
> The Government has formulated strict guidelines for application to Ministers and full-time Governor-in-Council appointees, who have wide-ranging roles of an administrative and executive nature.
>
> Because of the wide variety of duties that may be given to individual Parliamentary Secretaries, the Government has decided not to establish a detailed and comprehensive formal conflict of interest régime for Parliamentary Secretaries as a group. It is all the more important, therefore, that you examine your own particular responsibilities as a Parliamentary Secretary on a continuous basis and ensure that there is no possibility that a real or apparent conflict of interest or any undue benefit will arise. I would encourage you to discuss any matters on which you may require some guidance with your Minister in order that misunderstandings may be avoided.
>
> Parliamentary Secretaries are asked to observe certain guidelines relating to their activities after they have left Government service or which are in contemplation of leaving such service. They are aimed at avoiding any suspicion that former Parliamentary Secretaries

might use their past positions in a way that might adversely affect the objectivity and disinterestedness of Government service. I would ask you to act in accordance with these guidelines when you cease to serve as a Parliamentary Secretary.

Finally, I draw to your attention the provisions of the Senate and House of Commons Act, relating to conflict of interest, namely those dealing with incompatible offices, prohibited contracts with the Government and prohibitions on fees received for influencing other Parliamentarians. I would also urge you to read carefully Bill C-6, the Independence of Parliament Act, proposing a comprehensive conflict of interest régime for all Members of Parliament and Senators which received second reading in 1979 but was not passed by Parliament, as well as the second reading debates on this Bill. These latter documents should serve as useful background in your assessment of your personal position.

D. POST-EMPLOYMENT GUIDELINES FOR PARLIAMENTARY SECRETARIES

A. Offers of Employment Outside Government

1) Parliamentary Secretaries should not allow themselves to be influenced in their pursuit of their official duties by plans for or offers of employment outside Government:

a) Parliamentary Secretaries should disclose to the Minister all serious offers of positions outside Government service which in their judgement put them in a position of a real or apparent conflict of interest;

b) Parliamentary Secretaries should not accept any offers of employment outside Government service without first informing the Minister;

c) Parliamentary Secretaries should, in seeking employment or an occupation outside Government service or in preparing themselves for commercial activities after they will have left Government service, ensure that these endeavours do not lead to real or apparent conflicts of interest or in any way interfere with their official duties.

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2) In any official dealing with former office holders, Parliamentary Secretaries must ensure that they do not provide grounds or the appearance of grounds for allegations of improper influence, privileged access or preferential treatment.

B. Guidelines Applying to Employment and Commercial Activities of Former Parliamentary Secretaries

The following guidelines are to be applied with the aim of protecting the individual liberty of former Parliamentary Secretaries to the fullest extent possible.

These guidelines do not apply to former Parliamentary Secretaries who remain in the House of Commons to the extent that they would impede the performance of their duties as Parliamentarians, but in such circumstances the former Parliamentary Secretary must take care to follow the appropriate Parliamentary laws, rules and conventions relating to conflict of interest.

1) Within a period of one year of leaving office, Parliamentary Secretaries should not:

a) accept appointment to a board of directors of a commercial corporation which, as a matter of course, was in a special relationship with the department with which they were associated on an ongoing basis during the last year of their tenure as Parliamentary Secretaries;

b) change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, transaction, case or other matter to which the Government of Canada is a party and in which they had a personal and substantial involvement on behalf of the Government during the last year of their tenure as Parliamentary Secretaries;

c) lobby for or on behalf of any person or commercial corporation before any department or agency with which agency they were associated on an ongoing basis during the last year of their tenure as Parliamentary Secretaries.

2) Within a period of six months of leaving office, Parliamentary Secretaries should not:

a) accept employment with a commercial corporation with which they had significant

direct offical dealings as Parliamentary Secretaries during the last year of their tenure;

b) change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, case, transaction or other matter which fell under their authority during the last year of their tenure;

c) give counsel for commercial purposes concerning the programs or policies of the department or agency with which they were associated on an ongoing basis, or with which they had a direct and substantial relationship during the last year of their tenure.

NOTES: For these purposes "department or agency" includes Crown corporations but not quasi-judical bodies. "Special relationship" in respect of paragraph 1(a) means regulation of the corporation by the department or agency, receipt by the corporation of subsidies, loans or other capital assistance from the department or agency, and contractual relationships between the corporation and the department or agency.

E. GUIDELINES FOR GOVERNOR-IN-COUNCIL APPOINTEES

The text of the current Conflict of Interest Guidelines for Persons Appointed to Public Office by the Governor-in-Council provides as follows:

1. PURPOSE

The purpose of this memorandum and its Annexes is to provide details of the Government's guidelines on conflicts of interest for certain persons appointed to public office by the Governor-in-Council, and to provide information concerning the procedures to be followed by these persons in making arrangements to comply with the guidelines.

2. SCOPE OF APPLICATION

The guidelines set out in this memorandum apply to Governor-in-Council appointees (hereafter referred to as officials) who serve in such offices as may from time to time be designated by the Cabinet.

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3. GUIDELINES

Officials are expected to arrange their private affairs in a manner that will prevent real or potential conflicts of interest from arising. A basic principle in the Government's conflict of interest policy is that the onus for preventing real or potential conflicts of interest is clearly on the individual.

As a minimum standard of conduct for officials, the guidelines for public servants set out in PC 1973-4065 of December 18th, 1973, (see Annex A) apply mutatis mutandis to all officials but guidelines in this memorandum take precedence over them. Specific provisions in any relevant legislation continue of course to apply.

A. Prohibited Practices

(1) An official may not engage in the practice of a profession or in the management or operation of a business or commercial activity at any time while holding office;

(2) Officials may not retain or accept directorships in any commercial corporations. Although it might be proper to retain or accept directorships in organizations of a philanthropic or non-commercial character, even here great care must be taken to prevent conflicts of interest from arising.

B. Arrangements with Respect to Property

(1) Exempt property

Property held by an official for personal use and not of a commercial character is not subject to the requirements of divestment or public disclosure under these guidelines. Exempt property is subject however, as mentioned above, to the guidelines for public servants.

Examples of exempted property are: the residence or residences actually used by an official, including a summer or winter residence or farm actually used as a residence; personal household goods or effects or other property used for ordinary living and enjoyment; automobiles, boats, skidoos and other modes of transport for personal or family use including privately owned aircraft; cash, including cash held in chequing or savings accounts, Canada savings bonds, securities of any level of government in Canada or agencies of these

governments; registered retirement savings plans, and investments made in mutual funds for the purpose of providing retirement income; and debts.

If debts pose any conflict of interest problems, officials have a responsibility under these guidelines to seek advice either from their Minister or their Deputy Head.

(2) Non-exempt property

Officials, in arranging their private affairs with respect to non-exempt property, must either proceed by divestment and/or, where applicable, as set forth in paragraph (b) below, by public declaration.

(a) Divestment

Under this method, officials should divest themselves by selling or placing in trust their holdings of a business, commercial or financial nature, and particularly holdings in commercial enterprises or ventures that could be directly affected as to value by decisions taken by the Government pursuant or related to existing or proposed policy.

Officials who decide to place their holdings in trust may establish either a frozen trust or a blind trust. Care must be exercised to ensure that the terms of the trust agreement cannot be interpreted as leaving in the hands of the official any powers of management or decision over the assets placed in trust.

(i) Frozen Trust

A frozen trust is one in which the trustee is instructed to maintain the holdings placed in trust exactly as they were when the trust was established. An official who establishes a frozen trust will be empowered to receive from the trustee any income earned by the trust, and any information the filing of which is required by law. The Assistant Deputy Registrar General may act as trustee if an official wishes to enter into a frozen trust agreement between himself and the ADRG.

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(ii) Blind Trust

A blind trust is one in which the trustee is empowered to make all investment decisions concerning the management of the trust, with no direction from or control by the official. In this type of trust, to ensure freedom from conflict, no information will be provided to the official except information required to permit an annual evaluation of the trust and any information the filing of which is required by law. An official who establishes a blind trust will be empowered to receive any income earned by the trust, and to add or withdraw capital funds as he sees it. (The ADRG cannot serve as trustee in any blind trust arrangement).

(iii) Duration of Trusts

The term of any trust is to be for as long as the official who establishes the trust continues to hold any office which the Cabinet has designated as subject to these guidelines.

(iv) Trustees

Care must be exercised in selecting trustees for either trust arrangement. If a single trustee is appointed, the trustee ought to be a public trustee or a company such as a bank, trust company, or investment company, which is public and known to be qualified in performing the duties of a trustee, or an individual who is recognized as performing trustee duties in the normal course of his work. If a single trustee is appointed he should clearly be "at arm's length" from the official. If more than one trustee is selected, at least one of them must be a public trustee or one of the institutions described above.

(v) Filing of Trust Documents

Under the two trust options available, officials will be required to file with the Assistant Deputy Registrar General two copies of any trust instrument and a statement that a trust has been executed. With the exception of the statement that a trust instrument exists, this information, including the copies of the trust instruments, will be kept in confidential files in the Office of the Assistant Deputy Registrar General and will not be made available to anyone for any purpose once it has been agreed that the trust instrument is in a form and of sufficient detail to comply with these guidelines or any guidelines issued supplementary to them with which the official is expected to comply.

(b) Public Declaration

Officials have the option of making a public declaration of certain kinds of holdings to provide added flexibility in dealing with property over which they may wish to retain control. Declaring ownership under this option will permit officials to deal with the property they declare in the same way as any other citizen subject only to the exercise of a greater degree of vigilance to ensure that ownership of the property that is declared publicly or dealings in this property cannot even remotely give rise to the appearance of a conflict of interest. Public declarations made by officials who choose to use this option must be registered, and will be open for inspection in a Public Registry to be set up for this purpose in the Office of the Assistant Deputy Registrar General.

There are limitations to the use of this option. It is intended primarily to be used in respect of property, such as leasehold interests, real property, private companies the stocks or shares of which are not traded on public exchanges, and other assets which cannot easily be affected as to value by decisions of Government policy. The use of

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this option is not to extend to stocks or securities traded on public exchanges (which must either be sold or placed in trust), and must not extend to property the management of which could conceivably put an official in a conflict of interest situation.

C. Spouses and Dependent Children

These guidelines do not formally apply to spouses or dependent children. It is all the more important therefore that officials should bear in mind their individual responsibility to prevent conflicts of interest, including those that might conceivably arise out of dealings in property or other holdings, which are owned or managed, in whole or in part, by their spouse or dependent children.

4. ADMINISTRATIVE ARRANGEMENTS

(A) Completion

Arrangements made by an official to avoid conflicts of interest will be considered as complete when they have been approved by the ADRG and the Minister responsible for the official has been informed accordingly; when difficulties have arisen between the ADRG and the official, the Minister responsible shall approve the arrangement. In the case of Deputy Heads, the Prime Minister will approve the arrangements in instances of disputes.

(B) Costs

When the ADRG is chosen as the trustee for a frozen trust, any administrative costs incurred by the government in having him perform the duties of a trustee will be borne out of the public treasury. In all other cases, the responsibility for costs rests with the official.

(C) Public Registry

Officials will be required to register with the ADRG's Office any public declaration they may make of their interests or holdings.

In addition, they will be required to complete and provide to the ADRG's Office a general conflict of interest statement, on which they will indicate the arrangements they have made to comply with the Government's policy and these guidelines or guidelines supplementary to them.

These public declarations and general conflict of interest statements will be open to public inspection in the Public Registry. (A draft copy of the general conflict of interest statement, and a sample public declaration are attached for information purposes only.)

(D) Documents

(1) Safekeeping

The ADRG will be responsible for ensuring that any and all personal and confidential documents provided to his Office by officials to meet the requirements of these guidelines are placed in personal confidential files and held in secure safekeeping at all times. The ADRG will be responsible also for ensuring that documents provided to his Office by officials for purposes of official registration and public inspection are placed in personal unclassified files and held in safekeeping in the Public Registry where they will be open to public inspection.

(2) Return

If an official dies in office, his confidential file held in the ADRG's Office is to be closed and returned immediately to the executors of the official's estate by the ADRG so that no permanent record of his holdings or trust agreement will be maintained in the ADRG's Office. If an official relinquishes, or for any other reason ceases to hold any office to which he was appointed by the Governor-in-Council, and consequently ceases to be subject to the Government's policy on conflict of interest or to any guidelines issued pursuant to that policy, the ADRG, immediately he has been properly notified, will seal the official's confidential file and return it to the official. The ADRG will immediately withdraw the official's unclassified file from the Public Registry.

5. PROCEDURES

The procedures to be followed in implementing these guidelines are set out in a Annex B to this memorandum.

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6. FAILURE TO COMPLY

An official failing to comply with the guidelines may be in breach of the public trust and is liable to sanctions up to and including revocation of appointment.

Annex A, P.C. 1973-4065, Public Servants Conflict of Interest Guidelines, is reproduced in Section I of this Schedule D. Annex B follows.

ANNEX B

PROCEDURES

The procedures to be followed to ensure that officials are able to arrange their personal affairs in a manner that will prevent real or potential conflicts of interest are listed below:

1. Each official will provide to the Assistant Deputy Registrar General (ADRG) information about all his personal investments and other holdings, including those that may be regarded as exempt property.

2. The ADRG or a member of his staff will examine the information provided by the official and will inform him whether in the opinion of the ADRG any or all of the official's investments or other holdings are exempt property, or alternatively, whether any or all of them are of a kind likely to give rise to a real or potential conflict of interest.

3. If it is the ADRG's opinion, after careful examination of the information provided by the official, that all the official's investments and other holdings are exempt property, the official will be so informed in writing by the ADRG who will at the same time ask the official to complete a general conflict of interest statement and return it to him. The ADRG will then inform the responsible Minister that he is satisfied in the light of the information disclosed by the official that the latter need not take further action to comply with the conflict of interest guidelines for officials.

4. If it is the ADRG's opinion that continued ownership or management by the official of any or all of his investments or other holdings is likely to give rise to a real or potential conflict of interest, he will so inform the official in writing and indicate that he will be available to give him advice on the guidelines.

5. The official will inform the ADRG in writing of the arrangements he proposes to make and will provide him with copies of all documents related to these arangements, including two copies of any trust agreement, any public declaration and a completed general conflict of interst statement. The ADRG will examine the proposed arrangements and related documents and if he is of the opinion that the arrangements made and documents provided by the official meet the requirements of the conflict of interest guidelines for officials, he will so inform in writing the official and his Minister.

6. The firm expectation is that officials and the ADRG should and will have little or no difficulty in reaching agreement on the arrangements an official may wish to make to comply with the requirements of the conflict of interest guidelines. In view of this firm expectation it is incumbent on the ADRG and his staff (and equally on officials) to ensure that if any problem should arise, every possible solution is thoroughly and comprehensively explored in an effort to resolve the problem without having to refer it to higher authority. There may be, however, instances in which the ADRG may not agree with the arrangements proposed by an official, or in which an official for sound personal reasons, may feel that he can make arrangements that are consistent with the guidelines only by imposing undue cost or disadvantage on himself or his family. In these circumstances, the official should first seek the advice of his Deputy Head who may decide to refer the matter to his Minister. The latter's decision is final. If the issue involves a Deputy Head, he should seek the advice of the Clerk of the Privy Council who may consider the issue to be of sufficient significance to refer it to the Prime Minister for a final decision.

   The firm expectation, however, is that references will be done only very rarely either to a Minister or to the Prime Minister.

7. The ADRG is to be informed of the resolution of the problems referred to in paragraph 6 and of the arrangements that will be made by the official who encountered the problem.

8. To ensure that all Public Declarations and general conflict of interest statements are accurate and up to date at all times, officials are asked to report to the ADRG any dealings in, additions to, deletions from, or other changes affecting property or holdings that were or will be dealt with through Public Declarations.

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9. Exempted property need not of course be dealt with according to any of the options available under these guidelines, but officials are asked to inform the ADRG of any actions that might have the effect of removing property or other holdings from the exempted category.

10. Enquiries

Enquiries about these guidelines and conflict of interest matters generally, should be directed to:

Office of the Assistant Deputy Registrar General,
Department of Consumer and Corporate Affairs,
4th Floor, Trafalgar Building,
207 Queen Street,
Ottawa, Ontario K1A 0C9

The telephone number is (613) 995-0721.

Government of Canada / Gouvernement du Canada

CONFLICT OF INTEREST STATEMENT
DÉCLARATION CONCERNANT LES CONFLITS D'INTÉRÊTS

I, the undersigned, do hereby state that I am in compliance with the Government of Canada's guidelines on conflict of interest to which I am subject.

Je, soussigné(e), affirme par les présentes que je suis en conformité avec les lignes de conduite relatives aux conflits d'intérêts du Gouvernement du Canada auxquelles je suis assujetti(e).

I do hereby declare:

Je déclare par les présentes que:

☐ all my personal holdings are exempt property.
tous mes biens personnels sont des biens exclus.

☐ I have dealt with all my non-exempt property through the arrangements described below:
pour tous mes biens non-exclus, j'ai procédé par l'une et/ou l'autre des dispositions décrites ci-dessous.

a frozen trust: by instrument dated
une fiducie en compte bloqué: instrument en date du _____

a blind trust: by instrument dated
une fiducie sans droit de regard: instrument en date du _____

a Public Declaration dated
une Déclaration publique en date du _____

I make this statement for the purpose of official registration in the full knowledge that it will be available for public examination in the Conflict of Interest Public Registry.

Je fais la présente déclaration en sachant parfaitement qu'elle sera consignée officiellement dans le Registre public concernant les conflits d'intérêts auquel le public aura accès.

Date of Statement *Date de la déclaration*	Name of Declarer *Déclarant(e)*	Signature

FOR THE USE OF THE DEPUTY REGISTRAR GENERAL

I hereby certify that this statement was filed with the Assistant Deputy Registrar General.

Date filed
Date déposée

À L'USAGE DU SOUS-REGISTRAIRE GÉNÉRAL

Je certifie par les présentes que cette déclaration a été déposée chez le sous-registraire général adjoint.

Deputy Registrar General of Canada
Sous-registraire général du Canada

CSA 273 (3-75)

C O N F L I C T O F I N T E R E S T

PUBLIC DECLARATION

I,.....do hereby declare
that I hold a.....per cent (...) interest in the
firm known as.....
of.....

This declaration is made in accordance with the Conflict of Interest Guidelines. I understand that so long as I remain
a.....subject to the guidelines
applicable to.....
this Declaration will be available for public examination in the Office of the Assistant Deputy Registrar General.

Dated at Ottawa this.....day of....., 19..

_____
(Signature)

F. POST-EMPLOYMENT GUIDELINES FOR OTHER PUBLIC OFFICE HOLDERS

The post-employment policy for public servants generally is set out in guidelines which are in fact made up of the following five separate appendices dated April 24, 1978, embodying the principles, rules and procedures.

Appendix I: Principles Regarding the Activities of Holders of Public Office

1) Current and former holders of public office must ensure by their actions that the objectivity and impartiality of government service are not cast in doubt and that the people of Canada are given no cause to believe that preferential treatment is being or will be unduly accorded to any person or organization.

2) Current and former holders of public office must ensure by their actions that there is no reasonable ground for belief that it is possible to have privileged access to government personnel or services.

3) Current and former holders of public office must exercise care in the management of their private affairs so as not to benefit, or to appear to benefit, from the use or communication of confidential information acquired in the course of their official duties.

Appendix II: Guidelines for Holders of Public Office During Their Employment with the Government

1) No Minister, Parliamentary Secretary, Governor-in-Council appointee, public servant or exempt staff member ("office holder") should allow himself to be influenced in his pursuit of official duties by plans for or offers of outside employment:

a) the office holder should disclose to his superior all serious offers of positions outside government service which in his judgement put him in a position of a real or apparent conflict of interest;

b) the office holder should disclose to his superior any job offer under serious consideration that has been received from an individual, organization or interest group with a commercial orientation in the private sector and with which the office holder has official dealings;

c) the office holder should within a reasonable time disclose all offers of employment outside government service that have been accepted;

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d) the office holder should, in seeking employment outside government service or in preparing himself for commercial activities after he has left the employ of the government, take great care to ensure that these endeavours do not lead to real or apparent conflicts of interest or in any way interfere with his official duties, and do not in the absence of the permission of his superior involve commercial negotiations with other government employees.

2) Office holders have a duty in any official dealings they have with former office holders to ensure that they do not provide grounds or the appearance of grounds for allegations of improper influence, privileged access or preferential treatment.

NOTE: "Governor-in-Council appointees" denotes persons appointed by or with the approval of the Governor-in-Council or a Minister, or in receipt of remuneration fixed by the Governor-in-Council who are in full-time positions with government departments, Crown corporations and autonomous agencies, but not those persons who are members of bodies with primarily judicial or quasi-judicial functions.

Appendix III: Guidelines Applying to Employment and Commercial Activities of Former Holders of Public Office

The following guidelines are provided to give content to the principles in Appendix I, and are to be applied in accordance with those principles and with the aim of protecting the individual liberty of each public servant and former public servant to the fullest extent possible.

The guidelines apply to arrangements made before and after office holders leave government service. Former Ministers, deputy ministers, heads of agencies and exempt staff at the equivalent level of deputy head are requested not to engage in the activities described in category A for a period of two years, and to delay for one year any participation in activities described in category B. The corresponding delay period for parliamentary secretaries, other full-time Governor-in-Council appointees and public servants and exempt staff at the SX1 equivalent level or above is one year for category A and six months for category B. The guidelines do not apply to persons hired under Interchange Canada. The policy gives individual Ministers the right to designate other public servants, Governor-in-Council appointees and exempt staff, including those whose principal, though not exclusive, employment is with the government or one of its agencies, as being subject to the guidelines. The advisory committees may, upon request from a Minister or deputy minister and with the approval of the Prime Minister (in the case of deputy heads) of

the minister responsible (in the case of other full-time Governor-in-Council appointees and of exempt staff) and of Treasury Board (in the case of public servants) exempt any position or set of positions from the application of the guidelines in any case where the committees believe that such an exemption is in the public interest.

Category A

1. An office holder must not, within the relevant time period, accept appointment to a board of directors of a commercial corporation which was, as a matter of course, in a special relationshp with the department or agency with which he was last employed, where "special relationship", means regulation of the corporation by the department or agency, receipt by the corporation of subsidies, loans or other capital assistance from the department or agency, and contractual relationships between the corporation and the department or agency.

2. An office holder must not, within the relevant time period, change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, transaction, case or other matter to which the Government of Canada is a party and in which he had a personal and substantial involvement on behalf of a department or agency of the government.

3. A former office holder, must not, within the relevant time period, lobby for or on behalf of any person or commercial corporation before any department or agency with which he was employed or with which he had a direct and substantial official relationship during the period of two years prior to the termination of his employment.

Category B

1. An office holder must not, within the relevant time period, accept employment with a commercial corporation with which he had significant direct official dealings during the last year of his employment.

2. An office holder must not, during the relevant time period, change sides to act for or on behalf of any person or commercial corporation in connection with any specific proceeding, cause, transaction or other matter which fell under his authority as an employee of the government during the period of one year prior to the termination of his employment.

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3. A former office holder must not, within the relevant time period, give counsel for commercial purposes concerning the programs or policies of the department or agency with which he was employed or with which he had a direct and substantial relationship during the period of one year prior to the termination of his employment.

Where, pursuant to disclosure of an offer of employment under guidelines 1(a) or 1(b) of Appendix II, the advice of an advisory committee is sought with respect to the application of guidelines A1 and B1 the committee may advise that the time period for the purposes of these guidelines begins on the date the disclosure was made or on any date subsequent to the date of disclosure, that is before the date on which the office holder leaves government service.

Note: "Office holder" includes former "office holders", as defined by Appendix II, and "Governor-in-Council appointee" has the same meaning as in Appendix II.

Appendix IV: Administrative Arrangements

Advisory committees have been established to determine the application of the guidelines in specific instances and to help Ministers, Parliamentary Secretaries, appointees, public servants and exempt staff understand how the guidelines apply to their particular cases. The committees also advise on the operation of the guidelines and recommend changes where necessary. The committees are authorized to recommend exemptions from the guidelines in any case where fairness to individuals or the public interest requires. Such recommendations will be made to the Prime Minister (in the case of Ministers, Parliamentary Secretaries, and deputy heads) to the Minister responsible (in the case of other full-time Governor-in-Council appointees and of exempt staff) and to the Treasury Board (in the case of public servants).

An Advisory Committee chaired by the President of the Treasury Board and composed of selected Ministers has been established to advise all Ministers and Parliamentary Secretaries who require assistance in interpreting the application of the guidelines to specific circumstances.

An Advisory Committee made of the Clerk of the Privy Council and the Secretary to the Cabinet, the Secretary for Federal-Provincial Relations, the Secretary to the Treasury Board, the Chairman of the Public Service Commission and the Deputy Minister of Justice has also been established to advise all appointees of the Governor-in-Council and exempt staff who require assistance in interpreting the application of the guidelines to

specific circumstances. The Committee will report its advice to the Prime Minister and to the individual involved. The Prime Minister will in turn report to the House any known failure of former Governor-in-Council appointees or exempt staff to abide by advice given by the Committee.

Appropriate arrangements have been made similarly to advise public servants appointed under the Public Service Employment Act. In addition, all Crown corporations and autonomous agencies are urged to adopt similar guidelines and mechanisms for those of their senior employees who are neither public servants nor appointees of the Governor-in-Council. A special request has been made to ensure that members of the Armed Forces and the Royal Canadian Mounted Police will also be covered.

The policy will apply to all persons appointed to new positions within the government and its agencies, who will be expected to conform to it as a matter of honour and of personal choice. Before being sworn in, individuals will be asked to read the guidelines and to govern themselves accordingly. While the policy does not officially apply to present incumbents until such time as they accept new appointments in the public service, it is expected that they will continue to abide by it.

Appendix V: Rules of Practice of Hiring of Former Public Servants by the Government

1) In order to reduce the possibility of conflict of interest, a former Governor-in-Council appointee or public servant who has entered into the practice of lobbying on behalf of clients or of giving counsel for commercial purposes about government activities, will not, while so engaged, be considerd to be eligible for appointment to the Board of Directors of a Crown corporation or of any agency in which the government of Canada has a majority interest.

2) Individual Ministers and the Treasury Board, as may be appropriate, will approve all personal service contracts involving payments by the government of $2,000 or more to former Governor-in-Council appointees or public servants who are in receipt of a government pension and in so doing will consider carefully the total annual benefits to accrue to the individual as a result of his pension entitlement and of personal service contracts with the Government or its agencies.

G. CONFLICT OF INTEREST WORDING IN CONTRACTS OF EMPLOYMENT

The typical wording found in the contract of employment for a member of the public service contains the following condition:

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> I would like to bring to your attention that employees of the public service of Canada are required to observe the "Public Service Conflict of Interest Guidelines". Under Section 6 of these guidelines, employees are expected to disclose to their superiors any business, commercial or financial interest which might conceivably be construed as being in actual or potential conflict with their duties. A copy of these guidelines is attached and should be read. ... Please confirm your acceptance of this offer by signing and returning the duplicate copy of this letter ...

Some letters, which form the basis of the employment contract, simply state: "Also, I would like to remind you that employees of the public service of Canada are required to observe the 'Public Service Conflict of Interest Guidelines."

The typical wording found in many collective agreements regarding conflict of interest is as follows: "Unless otherwise specified by the Employer as being in an area that could represent a conflict of interest, employees shall not be restricted in engaging in other employment outside the hours they are required to work for the Employer."

H. OATHS OR AFFIRMATIONS

Following are the Oath or Affirmation of Allegiance, the Oath or Affirmation of Office and Secrecy and the Oath or Affirmation required of members of the Privy Council.

OATH OR AFFIRMATION OF ALLEGIANCE

You, do swear (or affirm) that you will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law.

SO HELP YOU GOD.
(omit for affirmation)

OATH OR AFFIRMATION OF OFFICE AND SECRECY

I, solemnly and sincerely swear (or affirm) that I will faithfully and honestly fulfil the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter than comes to my knowledge by reason of such employment. (in the case where an oath is taken add,"So help me God").

OATH OR AFFIRMATION OF THE MEMBERS OF THE PRIVY COUNCIL

You, do solemnly promise and swear (or affirm) that you will serve Her Majesty truly and faithfully in the Place of Her Council in this Her Majesty's Dominion of Canada, you will keep close and secret all such matters as shall be treated, debated and resolved on in Privy Council, without publishing or disclosing the same or any part thereof, by word, writing, or any otherwise to any person out of the same Council, but to such only as be of the Council, and yet if any matter so propounded, treated and debated in any such Privy Council, shall touch any particular person, sworn (or affirmed) of the same Council upon any such matter as shall in any wise concern his loyalty and fidelity to the Queen's Majesty, you will in no wise open the same to him, but keep it secret, as you would from any person, until the Queen's Majesty's pleasure be known in that behalf. You will in all things to be moved, treated and debated in any such Privy Council, faithfully, honestly and truly declare your mind and opinion to the honour and benefit of the Queen's Majesty, and the good of her subjects without partiality or exception of person, in no wise forebearing so to do from any manner of respect, favour, love, meed, displeasure, or dread of any person or persons whatsoever. In general you will be vigilant, diligent and circumspect in all your doings touching the Queen's Majesty's affairs; all which matters and things you will faithfully observe and keep, as a good Councillor ought to do to the utmost of your power, will and discretion.

SO HELP YOU GOD.
(omit for affirmation)

I. CONFLICT OF INTEREST GUIDELINES FOR PUBLIC SERVANTS

P.C. 1973-4065

GUIDELINES TO BE OBSERVED BY PUBLIC SERVANTS CONCERNING CONFLICT OF INTEREST SITUATIONS

Short Title

1. These Guidelines may be cited as the Public Servants Conflict of Interest Guidelines.

Guidelines

2. It is by no means sufficient for a person in a position of responsibility in the public service to act within the law. There is an obligation not simply to obey the law but to act in a manner so scrupulous that it will bear the closest public scrutiny. In order that honesty and impartiality may

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be beyond doubt, public servants should not place themselves in a postion where they are under obligation to any person who might benefit from special consideration or favour on their part or seek in any way to gain special treatment from them. Equally, public servants should not have a pecuniary interest that could conflict in any manner with the discharge of their official duties.

3. No conflict should exist or appear to exist between the private interests of public servants and their official duties. Upon appointment to office, public servants are expected to arrange their private affairs in a manner that will prevent conflicts of interest from arising.

4. Public servants should exercise care in the management of their private affairs so as not to benefit, or appear to benefit, from the use of information acquired during the course of their official duties, which information is not generally available to the public.

5. Public servants should not place themselves in a position where they could derive any direct or indirect benefit or interest from any government contracts over which they can influence decisions.

6. All public servants are expected to disclose to their superiors, in a manner to be notified, all business, commercial or financial interests where such interests might conceivably be construed as being in actual or potential conflict with their official duties.

7. Public servants should hold no outside office or employment that could place on them demands inconsistent with their official duties or call into question their capacity to perform those duties in an objective manner.

8. Public servants should not accord, in the performance of their official duties, preferential treatment to relatives or friends or to organizations in which they or their relatives or friends have an interest, financial or otherwise.

SCHEDULE E

TENTATIVE DRAFT

THE HOUSE OF COMMONS OF CANADA

BILL C-000

An Act to require public office holders to act in accordance with certain principles of conduct, and to provide for the creation of an Office of Public Sector Ethics and the appointment of an Ethics Counsellor as head of that Office, and related purposes.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

1. This Act may be cited as the Ethics in Government Act.

OBJECTS

2. The objects of this Act are:

(a) to enhance public confidence in the integrity of public office holders;

(b) to establish a code of clear rules of ethical conduct applicable to all public office holders in the Government of Canada (including any department, commission, Crown corporation, council, board, bureau, agency, tribunal, or other establishment or political subdivision thereof) or any other public office holder appointed by the Governor-in-Council or by a minister;

(c) to minimize conflicts between the private and public interests of public office holders;

(d) to do the foregoing in a manner which preserves the independence of judges

and quasi-judicial agencies from government interference; and

(e) to encourage experienced and competent citizens to seek and accept public office and to facilitate interchange between private and public life.

INTERPRETATION

3. In this Act

"Non-elected public office holder" means all public office holders except ministers, parliamentary secretaries, and ministers' exempt staff.

"Public office holder" means officers and employees of Her Majesty in right of Canada, and for greater certainty, includes ministers, parliamentary secretaries; Governor-in-Council appointees; public servants; exempt staff members; officers, directors, or employees of federal boards, commissions, tribunals, Crown corporations and other agencies; officers and employees of the Parliament of Canada; members of the Canadian Armed Forces; and members of the Royal Canadian Mounted Police.

"Quasi-judicial agency" means any tribunal, board, commission or agency of the Government of Canada whose functions involve deliberative proceedings culminating in decisions made between contending interests.

CODE OF ETHICAL CONDUCT

Binding Effect of Code

4. Every public office holder now in office or hereafter appointed shall conform to the following principles of conduct:

Preamble

Service to one's country is a noble calling. Individuals holding public office, whether with great or modest duties, carry with them a portion of the responsibility for the destiny of our country and a part of the public trust which all Canadians vest in government.

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The public trust rests on a belief and confidence that those in public offices will conduct themselves in an ethical fashion.

In furtherance of these precepts, the following principles shall be binding upon each public office holder.

Principles

1. It is by no means sufficient for those persons holding public office in Canada to act within the law. There is a further obligation to act in a manner that will bear the closest public scrutiny.

2. Any conflict between the private interests of public office holders and their official duties must be resolved in favour of the public interest. Upon appointment to office, and thereafter, public office holders are expected to arrange their private affairs in a manner that will prevent such conflicts of interest from arising.

3. Public office holders shall neither solicit nor, other than for incidental gifts or customary hospitality of nominal value, accept transfers of economic value from private sources, even though no bribery is involved. This principle applies where the transfer is discretionary as distinct from being pursuant to an enforceable contract or property right of the public official.

4. Non-elected public office holders shall not, without prior approval of their superior, step out of their official roles to assist private entities or persons in their dealings with the government where this would result in preferential treatment.

5. Public office holders shall not knowingly take personal advantage of or private benefit from information obtained in the course of their official duties which is not generally available to the public.

6. Public office holders shall not directly or indirectly use, or allow the use of, government property of any kind, including

property leased to the government, for anything other than officially approved activities.

7. Non-elected public office holders shall not engage in partisan political activities which impair the political neutrality, either real or perceived, of the public service.

8. Non-elected public office holders shall not express publicly their personal views on matters of political controversy, or on government policy or administration (apart from collective bargaining issues), where this is likely to impair public confidence in the existing or subsequent performance of their duties or which is likely to impair relations with other governments.

9. Public office holders shall not engage in personal conduct which exploits for private reasons or personal gratification their position of authority, or which would tend to discredit the professionalism of the public service.

10. Public office holders have a duty not to act, after they leave office, in such a manner as to cast doubt on the probity and impartiality of the governmental process or in any other way to diminish public confidence in the integrity of government.

PROCEDURAL RULES TO MINIMIZE CONFLICTS OF INTEREST

Regulations

5. The Governor-in-Council may make regulations outlining procedures to be followed by public office holders in order for them to act in accordance with the general principles enunciated in the Code of Ethical Conduct, and in particular to minimize conflicts between their private interests and public duties.

OFFICE OF PUBLIC SECTOR ETHICS

Establishment of Office

6. (a) There is hereby established an Office of Public Sector Ethics.

Appointment of Ethics Counsellor

(b) The Governor-in-Council may appoint an officer, to be called the Ethics Counsellor, who shall be the head of the Office of Public Sector Ethics.

Staff

(c) The Ethics Counsellor may determine the staff requirements for the Office of Public Sector Ethics as required. Such staff shall be appointed pursuant to the Public Service Employment Act.

FUNCTIONS OF ETHICS COUNSELLOR

Advisory Role

7. (a) The Ethics Counsellor shall act as adviser:

(i) to the Prime Minister with respect to the procedures applicable to ministers, parliamentary secretaries, and public office holders appointed by Governor-in-Council;

(ii) to ministers with respect to the procedures applicable to them, and to the exempt staff of ministers' offices; and

(iii) to heads of departments and agencies with respect to the procedures applicable to them and their personnel.

(b) The Ethics Counsellor shall not be liable in law for any advice so provided.

(c) In a case where the Ethics Counsellor is asked to investigate a matter pursuant to Section 10 of this Act, and it is a matter in respect of which advice already has been given pursuant to this section, the Ethics Counsellor shall designate another person outside the Office of Public Sector Ethics to conduct such investigation and make public a report thereon.

Administrative Role

8. The Ethics Counsellor shall administer procedural rules established pursuant to section 5 of this Act to assist public office holders to act in accordance with the principles enunciated in the Code of Ethical Conduct including, but not limited to, the establishment or monitoring of trust arrangements, the required disclosures of private interests of public office holders, and the divestment of assets in cases where such is required.

Information and Education

9. The Ethics Counsellor shall provide information to public office holders and other interested parties, including prospective public office holders whenever practicable, as to the Code of Ethical Conduct, the procedural rules established pursuant to section 5 of this Act, any supplemental codes of ethical conduct, practices developed to assist public office holders to minimize conflicts of interest, and related matters.

Investigative Role

10. The Ethics Counsellor shall, at the request of the Prime Minister (with respect to any public office holder other than judges governed by the Judges Act), at the request of a minister (with respect to any public office holder for whom that minister is responsible and with the Prime Minister's consent), or at the request of any deputy minister or head of agency (with respect to any public office holder for whom the deputy minister or head of agency is responsible, and with the consent of the minister to whom such deputy minister or head of agency reports), conduct an investigation of any matter involving an alleged breach of the Code

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of Ethical Conduct, or of the Procedural Rules made pursuant to section 5 of this Act. For the purpose of such an investigation, the Ethics Counsellor shall have access to any government files or information relevant to the investigation. The Ethics Counsellor shall provide an opportunity for all parties concerned with the investigation to be heard, and in the case of anyone alleged to have breached the Code or rules, such persons shall be entitled to be represented by counsel. The hearings shall be open or closed, as the Ethics Counsellor considers appropriate. A report by the Ethics Counsellor on the investigation shall be made to the person requesting the investigation, and shall be made public by the Ethics Counsellor within three working days thereafter.

SUPPLEMENTAL CODES OF CONDUCT

11. The Ethics Counsellor shall assist deputy ministers and heads of agencies or commissions in restating in common format the rules in existing supplemental codes of ethical conduct as developed for that particular department, commission or agency, so that the same terminology, procedures and interpretations apply throughout the government, and shall assist deputy ministers and heads of agencies and commissions to develop supplemental codes according to the same common format where such do not yet exist.

FURTHER POWERS AND DUTIES

Authority to Waive or Modify

12. (a) The Ethics Counsellor shall, upon written application by the public office holder affected, have authority to waive or modify the particular application of any rule or procedure established pursuant to section 5 of this Act in specific cases where an unfair or unreasonable result would otherwise be imposed on the public office holder, so long as the principles in the Code of Ethical Conduct are still observed in the specific case in question, and provided that such waiver or modification shall be in writing,

stating the reasons, be made public, and a copy placed in a Public Registry in the Office of Public Sector Ethics.

(b) Where the public office holder seeking the waiver or modification would not, because of routine lines of reporting or accountability, have direct access to the Ethics Counsellor, such written request shall be accompanied by the consent of the Prime Minister, minister, deputy minister or head of the agency, as the case requires.

Report of the Ethics Counsellor

13. (a) The Ethics Counsellor shall, on or before the 31st day of December next following the end of each fiscal year, prepare a report relating to the operations of his or her office for that fiscal year but shall not include therein any confidential information supplied to him or her or his or her office by a public office holder. The Prime Minister shall cause this report to be laid before Parliament on that date or, if Parliament is not then sitting, on any of the first fifteen days that either House of Parliament is sitting thereafter.

(b) At the same time and for the same fiscal year the Prime Minister shall cause to be prepared and to be laid before Parliament a report of any action taken or any penalties imposed with respect to failure on the part of public office holders to observe the rules of conduct or to comply with procedures or any charges laid against public office holders under the Criminal Code or other statutes.

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THE JUDICIARY AND

QUASI-JUDICIAL AGENCIES

Independence

14. (a) In order to preserve judicial independence, the Governor-in-Council shall make no regulations under section 5 of this Act as to procedures to be followed by public office holders who are judges or who are appointed by Governor-in-Council as members of quasi-judicial agencies.

(b) Rules to minimize conflicts of interest applicable to members of quasi-judicial agencies shall be as contained in the amendments provided for in section 20 of this Act, or in subsequent enactments wih respect to quasi-judicial agencies established hereafter from time to time.

CROWN CORPORATIONS

C.B.C.A. provisions apply

15. (a) The provisions of the Canada Business Corporations Act applicable to officers and directors with respect to conflicts of interest shall apply, mutatis mutandis, to all Crown corporations of the Government of Canada.

(b) For greater certainty, the Code of Ethical Conduct enacted by this Act is binding upon all officers, directors and employees of Crown corporations of the Government of Canada, except that the limitations on political activity and public comment as contained in principles 7 and 8 shall not be binding upon part-time Governor-in-Council appointees on their boards of directors.

(c) Each Crown corporation of the Government of Canada shall develop a Supplemental Code of Conduct, specifying rules and procedures to minimize conflicts of interest which are appropriate to the requirements and particular attributes of the Crown corporation in question.

(d) The Supplemental Code shall in each case be developed by the Crown corporation in conjunction with the Ethics Counsellor, who shall ensure that common terminology and procedures are employed to the greatest extent possible in all Crown corporation supplemental codes, and that specified matters be addressed in each.

(e) The Supplemental Codes shall thereupon be enacted as regulations pursuant to each Crown corporation's governing statute, either separately or in an omnibus bill.

(f) In the case of Crown corporations created by Order-in-Council rather than statute, the applicable provisions on conflict of interest from the Canada Business Corporations Act shall be included in the Supplemental Code for that Crown corporation, and the Supplemental Code shall be enacted by order-in-council.

(g) In the case of new Crown corporations established from time to time, the foregoing provisions shall apply.

PARTISAN ACTIVITY

16. (1) No deputy minister or head of agency, and, except as authorized under this section, no other non-elected public office holder, shall

(a) engage in work for, on behalf of or against a candidate for election as a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories, or engage in work for, on behalf of or against a political party, or

(b) be a candidate for election as a member described in paragraph (a).

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(2) A person does not contravene subsection (1) by reason only of attending a political meeting or contributing money for the funds of a candidate for election as a member described in paragraph (1) (a) or money for the funds of a political party.

(3) Notwithstanding any other Act, upon application made to the Ethics Counsellor by a non-elected public office holder (other than a deputy minister or a head of agency), the Ethics Counsellor may, if he or she is of the opinion that the usefulness to the public service of that public office holder in the position he or she then occupies would not be impaired by reason of his or her having been a candidate for election as a member described in paragraph (1) (a), grant to the non-elected public office holder leave of absence without pay to seek nomination as a candidate and to be a candidate for election as such a member, for a period ending on the day on which the results of the election are officially declared or on such earlier day as may be requested by the employee if he has ceased to be a candidate.

(4) Forthwith upon granting any leave of absence under subsection (3), the Ethics Counsellor shall cause notice of his or her action to be published in the Canada Gazette.

(5) An individual on leave who is declared elected as a member described in paragraph (1)(a) thereupon ceases to be a non-elected public office holder.

(6) (a) Where any allegation is made to the Ethics Counsellor by a person who is or has been a candidate for election as a member described in (1)(a), that a deputy minister or head of agency or other non-elected public office holder has contravened subsection (1), the allegation shall be referred to the Ethics Counsellor who shall conduct an inquiry at which the person making the allegation and the deputy minister or

head of an agency or other non-elected public office holder concerned, or their representatives, are given an opportunity of being heard.

(b) In the case of a deputy minister or head of agency, the Ethics Counsellor shall report his or her decision on the inquiry to the Governor-in-Council who may, if the Ethics Counsellor has decided that the deputy minister or head of agency has contravened subsection (1), dismiss him or her.

(c) In the case of any other non-elected public office holder, the Ethics Counsellor, if deciding that the individual concerned has contravened subsection (1), may recommend to the deputy minister or head of an agency that the individual be dismissed, and such action shall forthwith be taken by the deputy minister or head of agency.

17. Section 32 of the Public Service Employment Act is hereby repealed.

PUBLIC COMMENT

18. (a) Where a non-elected public office holder engages in partisan political activity of a type not covered by section 16 but which appears to violate principle 7 of the Code of Ethical Conduct, or expresses publicly his or her personal views on matters which appear to be in violation of principle 8 of the Code of Ethical Conduct, the matter may be referred by the minister, deputy minister or head of agency responsible for the non-elected public office holder in question to the Ethics Counsellor. The Ethics Counsellor shall thereupon conduct an inquiry at which the person in question or his or her representatives are given an opportunity to be heard, and who shall make a report with respect to the matter to the person who referred the case for inquiry.

(b) The Ethics Counsellor, if deciding on the basis of the inquiry that the non-elected

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public office holder has contravened the principle 7 or 8, or both, may recommend in the report on the matter that the individual be dismissed, and such action shall be forthwith taken by the minister, deputy minister or head of agency concerned.

MISCELLANEOUS

Sworn Testimony

19. Nothing in the Code of Ethical Conduct or any rules made pursuant to this Act shall prevent a former public office holder from giving testimony under oath or affirmation, or from making statements required to be made under penalty of perjury.

20. The following acts are hereby amended:

(a) The Anti-dumping Act, with respect to the Anti-Dumping Tribunal, by insertion of the following section:

. . . . . .

(b) The Atomic Energy Control Act, with respect to the Atomic Energy Control Board, by insertion of the following section:

. . . . . .

(c) The Canadian Radio-television and Telecommunications Commission Act, with respect to the Canadian Radio-television and Telecommunications Commission, by insertion of the following section:

. . . . . .

(d) The Canada Labour Relations Code, with respect to the Canada Labour Relations Board, by insertion of the following section:

. . . . . .

(e) The Canada Lands Surveys Act, with respect to the Board of Examiners, by insertion of the following section:

. . . . . .

(f) The National Energy Board Act, with respect to the National Energy Board, by insertion of the following section:

. . . . . .

(g) The National Transportation Act, with respect to the Canadian Transport Commission, by insertion of the following section:

. . . . . .

(h) The Public Service Staff Relations Act, with respect to the Public Service Staff Relations Board, by insertion of the following section:

. . . . . .

(i) The Employment and Immigration Department and Commission Act, with respect to the Canada Employment and Immigration Commission, by insertion of the following section:

. . . . . .

(j) The Energy Supplies Emergency Act, 1979, with respect to the Energy Supplies Allocation Board, by insertion of the following section:

. . . . . .

(k) The Anti-Inflation Act, with respect to the Administrator, by insertion of the following section:

. . . . . .

(l) The Combines Investigation Act, with respect to the Restrictive Trade Practices Commission, by insertion of the following section:

. . . . . .

(m) The Canadian Human Rights Act, with respect to the Canadian Human Rights Commission, by insertion of the following section:

. . . . . .

(n) The Tariff Board Act, with respect to the Tariff Board, by insertion of the following section:

. . . . . .

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Gouvernement du Canada | Government of Canada
Groupe de travail sur les conflits d'intérêts | Task Force on Conflict of Interest

L'ÉTHIQUE DANS LE SECTEUR PUBLIC

Rapport du Groupe de travail sur les conflits d'intérêts

L'hon. Michael Starr **L'hon. Mitchell Sharp**
Les coprésidents

J. Patrick Boyer
Directeur exécutif

Canada

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CHAPITRE PREMIER

INTRODUCTION ET QUESTIONS PRÉLIMINAIRES

a) Contexte

Il y a, au sujet de l'éthique des employés de l'État, quelque chose de paradoxal: on ne semble s'en soucier vraiment que lorsque les normes reconnues sont transgressées. On pourrait dire que le degré d'attention porté aux problèmes de conflits d'intérêts varie en fonction directe de la fréquence et de la gravité des révélations d'actes répréhensibles ou des allégations concernant la façon dont sont conduites les affaires de l'État.

Peut-être est-ce là un signe encourageant en ce qu'il témoigne d'un sentiment de confiance général: le comportement des individus est présumé honorable, c'est dans l'ordre des choses. Par conséquent, quand le titulaire d'une charge publique outrepasse les pouvoirs qui lui sont confiés, cet abus de confiance est perçu comme un comportement anormal qui ne peut rester impuni. Que les particuliers doivent avoir une conduite exemplaire et toujours agir au mieux de l'intérêt public demeure un principe généralement admis.

C'est à la lumière de cet état d'esprit que l'on peut comprendre la façon dont sont abordés les questions de conflits d'intérêts au Canada. Nous avons fréquemment la preuve que les employés du gouvernement sont des êtres humains comme d'autres, car ils ne savent pas toujours résister aux tentations qui se présentent. Le Canada a eu sa part d'ennuis découlant de présumées situations de conflits d'intérêts au sein de l'administration publique, mais en comparaison avec certains autres pays où la corruption politique s'avère le système établi, le Canada a un dossier pratiquement vierge sous ce rapport. C'est en grande partie la culture politique d'un pays ou d'une région qui détermine non seulement ce qui est perçu comme de la corruption ou de l'abus de pouvoir, mais aussi l'attitude qui sera adoptée à l'égard de ce genre de pratiques.

Les règles d'éthique ayant cours actuellement dans notre administration publique fédérale doivent donc être évaluées selon les normes canadiennes, et non selon celles d'autres pays. Nous devons juger notre performance dans le contexte des traditions canadiennes du droit, de l'administration publique et des pratiques parlementaires.

b) Mandat du groupe de travail

Le mandat du Groupe de travail est établi dans deux documents, soit la lettre, datée du 7 juillet 1983, que vous nous avez adressée respectivement, Monsieur le Premier ministre, en tant que coprésidents du Groupe de travail et l'énoncé de nos attributions annexé à cette lettre. Il consiste donc à faire un examen général des principes et des règles qui orientent ou devraient orienter la conduite des personnes occupant ou ayant déjà occupé une charge publique au sein du gouvernement fédéral et à formuler des recommandations.

Nous reproduisons ici, à titre de rappel et pour le bénéfice de tous nos lecteurs, le contenu de ces deux documents:

> "La nature des principes et règles devant présider à la conduite des personnes qui occupent ou ont déjà occupé une charge publique a été abondamment débattue il y a quelques mois. Comme vous le savez, ces principes et règles doivent tenir compte de deux grandes nécessités. D'une part, l'intérêt public exige que nous recrutions des personnes hautement qualifiées et possédant des profils de carrière diversifiés pour s'occuper des affaires de l'État et de l'administration du pays. D'autre part, ces personnes doivent s'acquitter de leurs fonctions officielles et organiser leurs affaires personnelles de manière à maintenir la confiance du public envers le gouvernement. Il importe par ailleurs qu'elles puissent, à l'expiration de leur mandat, reprendre des emplois satisfaisants dans le secteur privé. Mais leurs actes ne doivent alors donner prise à aucun doute sur la probité ou l'impartialité de l'appareil gouvernemental.
>
> Depuis 1973, j'ai mis au point, en consultation avec mes collègues, un ensemble de principes et de règles visant la conduite des titulaires et ex-titulaires de charges publiques. L'institution de ces normes de conduite en ce qui touche les ministres, secrétaires parlementaires, membres du personnel soustrait et titulaires à plein temps de postes dotés par le gouverneur en conseil relève en effet de mes attributions de Premier ministre. En fait, ce code d'éthique est un des plus rigoureux jamais imposé par un gouvernement à ses officiels, et les restrictions applicables aux activités financières et commerciales des anciens ministres fédéraux comptent parmi les plus lourdes en vigueur au sein d'une démocratie parlementaire.
>
> Lorsque j'ai déposé à la Chambre, en 1976, un projet de code d'éthique intéressant les titulaires et ex-titulaires de charges publiques, mon objectif était

de concilier les avantages que la population canadienne retire de la mobilité des personnes entre les divers secteurs de la société - gouvernemental, industriel, commercial, universitaire et professionnel - avec le besoin de protéger l'intégrité de l'appareil gouvernemental et de prévenir l'exploitation de la confiance publique à des fins privées. Dans mon esprit, ces normes de conduite allaient devoir être passées en revue périodiquement du point de vue de leur équité et de leur applicabilité, et pour garantir qu'elles offraient un moyen efficace de résoudre les problèmes qui ne se prêtent pas à une codification juridique rigide mais font plutôt appel à la conscience et au jugement des intéressés.

À en juger par les récents débats sur cette question, il est clair que, selon certaines personnes, tout contact officiel entre titulaires et ex-titulaires de charges publiques apparaît comme du favoritisme, voire de la malhonnêteté. À mon sens, pareilles interprétations non seulement débordent l'esprit et le but des principes et des règles établis par le gouvernement du Canada, mais encore pourraient nuire sérieusement au recrutement des personnes hautement qualifiées et de compétences professionnelles diverses dont nous avons besoin pour gérer les affaires de l'État.

Pour ces motifs et compte tenu de mes attributions et responsabilités dans ce domaine, il m'apparaît indiqué, dans l'intérêt public, de faire procéder à une étude sur les principes et règles devant présider à la conduite des ministres, secrétaires parlementaires, membres du personnel soustrait et titulaires à plein temps nommés par le gouverneur en conseil durant et après leur période de service public. Les résultats de cet examen serviront également à la révision des normes de conduite intéressant les fonctionnaires...

J'aimerais que vous vous attachiez en particulier au besoin de garantir l'intégrité de l'appareil gouvernemental et la confiance que lui accorde le public, ainsi qu'à la nécessité d'attirer au service de l'État des personnes du plus haut calibre et de tous les secteurs de la société. Il ne s'agira pas pour vous d'examiner des faits passés, mais plutôt de définir les meilleurs moyens de maintenir et d'accroître la confiance du public dans nos institutions... J'ai l'intention de ... rendre (votre rapport) public peu après en avoir pris connaissance.

Je m'attendrai à ce que, dans l'exécution de votre mission, ... vous recueilliez des avis sur le code

d'éthique à appliquer en matière de conflits d'intérêts pendant et après l'exercice d'une charge publique, passiez en revue les lignes directrices en vigueur à cet égard au sein d'autres gouvernements au pays et à l'étranger ainsi que dans le secteur privé, et vous assuriez que vos propositions sont compatibles avec les dispositions de la Charte canadienne des droits et libertés et les principes du régime parlementaire canadien.

...Il importe au plus haut point d'arriver à un sain équilibre entre la nécessité d'attirer à la fonction publique des hommes et des femmes de grande compétence et de tous les milieux professionnels, et celle de faire en sorte que la confiance du public envers le gouvernement soit protégée et perçue comme telle. Il est en effet essentiel que les Canadiens aient confiance dans leur gouvernement, dans son appareil et dans le calibre des personnes qui se consacrent au service de l'État. C'est la qualité même du gouvernement du pays qui en dépend."

MANDAT

Attendu:

1. qu'il y va de l'intérêt de la population de faire participer aux affaires et à l'administration publiques du Canada des personnes hautement compétentes de divers milieux en leur confiant une charge publique,

2. que les titulaires de charge publique devraient s'acquitter de leurs fonctions officielles et mener leurs affaires privées de façon à conserver et à accroître la confiance du public dans le gouvernement,

3. qu'une fois terminé leur mandat officiel, les titulaires de telles charges devraient pouvoir reprendre un emploi satisfaisant au sein de la communauté,

4. que les actes des anciens titulaires de charge publique ne devraient semer aucun doute sur la probité et l'impartialité de l'administration publique, et

5. qu'il est essentiel qu'il soit tenu compte des facteurs ci-dessus lors de la détermination des meilleurs moyens pour guider la conduite de ces titulaires de charge publique pendant et après la durée de leur mandat officiel,

le groupe de travail examinera les politiques et pratiques qui devraient régir les ministres, secrétaires parlementaires, membres du personnel "exclu", titulaires à temps plein de postes dotés par le Gouverneur en conseil et fonctionnaires, pendant et après la durée de leur mandat officiel vu, en particulier, la nécessité de garantir l'intégrité du processus gouvernemental, d'assurer la confiance du public dans celui-ci et d'attirer au gouvernement des personnes hautement compétentes de toutes les couches de la société; le groupe d'étude fera rapport au Premier ministre.

Et sans limiter la portée générale de ce qui précède, le groupe d'étude doit:

a) examiner les renseignements disponibles eu égard à l'expérience en matière de lignes directrices actuelles concernant les conflits d'intérêts et emplois ultérieurs à une charge publique dans la mesure où ils peuvent aider à l'élaboration de politiques et de pratiques visant la conduite des titulaires de charge publique pendant et après l'exercice de leur mandat officiel;

b) examiner les renseignements disponibles eu égard à l'expérience acquise en cette matière par d'autres gouvernements, tant au Canada qu'à l'étranger, et dans le secteur privé;

c) veiller à ce que les mesures proposées en cette matière soient conformes à la Charte canadienne des droits et libertés; et

d) élaborer des mesures possibles dans ce domaine, compte tenu des principes du système parlementaire canadien.

c) Interprétation du mandat

Comme vous le laissez entendre dans la lettre que vous nous avez adressée, "l'affaire Gillespie" a été une des causes déterminantes de la constitution de notre Groupe de travail. Bien que fâcheuse, cette affaire s'est néanmoins révélée opportune dans la mesure où, comme nous en avons conclu, elle a permis de repenser les régles et les procédures actuellement en vigueur. Ces politiques et directives ont été établies plutôt à batons rompus et occasionnent des difficultés d'interprétation et

d'administration. Comme vous le dites, Monsieur le Premier ministre, les politiques concernant les conflits d'intérêts et les activités des anciens titulaires de charges publiques doivent "être passées en revue périodiquement du point de vue de leur équité et de leur applicabilité".

Notre mandat est clair et constitue l'un des meilleurs énoncés du noeud du problème: la nécessité d'équilibrer ou de concillier les règles d'éthique et l'habilité de recruter des personnes compétentes pour gérer les affaires de l'État. Il nous a néanmoins fallu en interpréter la nature et la portée en ce qui concerne trois sujets: la fonction publique, la magistrature et le Parlement.

Premièrement, au sujet de la fonction publique, vous nous indiquez dans votre lettre, Monsieur le Premier ministre, de procéder à une étude des principes et des règles devant présider à la conduite des ministres, secrétaires parlementaires, membres du personnel soustrait et titulaires à plein temps nommés par le gouverneur en conseil et vous ajoutez que "les résultats de cet examen serviront également à la révision des normes de conduite intéressant les fonctionnaires". Nous recommandons dans ce rapport une approche qui, à notre avis, marque une importante évolution dans la façon d'envisager ces questions au Canada et qui se veut la plus globale possible. Nous faisons donc plus que "suggérer des propositions" qui pourraient être applicables à la fonction publique; nous recommandons un système qui, s'il est mis à exécution, conviendra aux besoins des personnes au sein du gouvernement peu importe leur niveau, y compris les ministres du Cabinet, leur personnel soustrait, les secrétaires parlementaires, les personnes nommés par le gouverneur en conseil oeuvrant à plein temps, et les fonctionnaires.

Deuxièmement, en ce qui concerne la magistrature, nous sommes conscients de l'importance fondamentale du principe de l'indépendance des tribunaux dans notre système gouvernemental. Pour que la population ait foi en l'administration de la justice, nos tribunaux doivent demeurer et paraître demeurer à l'abri de toute ingérence du gouvernement. Aussi, bien que les juges nommés par le gouvernement fédéral entrent dans la catégorie des personnes nommées par le gouverneur en conseil et soient, par conséquent, directement visés par notre mandat, nous avons conclu que les dispositions actuelles devraient demeurer telles quelles. Nous faisons allusion ici au Conseil de la magistrature créé, selon les modifications apportées à la Loi sur les juges en 1975, pour s'occuper de toutes questions relatives à la conduite des juges. Nous sommes d'avis que les règles en matière de conflits d'intérêts qui s'appliquent généralement aux titulaires de charges publiques ne devraient pas toucher la magistrature, et que celle-ci devrait continuer d'être régie par ses propres règles et pratiques, telles qu'établies aux termes de la Loi sur les juges. Il est traité plus abondamment de cette question au chapitre 16 en

même temps que du cas complexe des titulaires de charges "quasi-judiciaires" à l'égard desquels nous formulons une proposition. Tenant compte de l'interprétation de notre mandat nous recommandons le maintien des dispositions actuelles visant à assurer l'indépendance de la magistrature.

Troisièmement, en ce qui concerne les parlementaires, nous nous retrouvons aussi face à un principe d'indépendance: cette fois il s'agit de l'indépendance du Parlement. Un examen de notre mandat révèle que le seul groupe exclu de notre étude est celui des parlementaires, soit les députés et les sénateurs. Or, c'est au sein de ce groupe que sont choisis les ministres et les secrétaires parlementaires, lesquels sont directement visés par notre mandat. C'est pourquoi nous avons jugé nécessaire de bien noter les règles fondamentales en matière de conflits d'intérêts imposées aux parlementaires tant par la loi que par les articles afférents du Règlement de la Chambre. Elles encadrent les principales règles d'éthique touchant les parlementaires et constituent les assises juridiques dont découlent les lignes directrices complémentaires à l'intention des secrétaires parlementaires et des ministres. Il était donc de mise de connaître à fond les règles concernant l'ensemble des parlementaires afin d'apprécier celles imposées aux ministres choisis parmi eux. Cette interprétation nous semble correspondre d'emblée à notre mandat de respecter "les principes du système parlementaire canadien". Néanmoins, compte tenu de l'importance traditionnellement attachée à l'indépendance du Parlement, toute proposition majeure dans ce domaine relève à notre avis des parlementaires eux-mêmes, peut-être de la façon proposée par le gouvernement fédéral en 1973 dans le Livre vert intitulé Les membres du Parlement et les conflits d'intérêts.

d) Optique générale de l'étude

Comme il n'entrait pas dans notre mandat de faire enquête sur des allégations de mauvaise conduite de la part de titulaires de charges publiques, nous n'avons pas abordé cet aspect. Les titulaires de charges publiques au sein du gouvernement fédéral canadien et de ses organismes s'astreignent à des normes de conduite des plus élevées et les cas de manquement grave sont exceptionnels.

Nos recommandations ne découlent pas de la nécessité de modifier ou de resserer ces normes de conduite ou d'appliquer plus rigoureusement les règles visant à minimiser les conflits d'intérêts. Nous tenons à faire cette précision, car notre recommandation d'établir un Bureau de l'éthique dans le secteur public que nous formulons plus loin pourrait être interprétée comme étant une réponse à un besoin de se doter de toute urgence d'un nouveau "chien de garde" pour protéger l'intérêt public, ce qui n'est absolument pas le cas.

Cependant, il s'impose clairement de fondre les lignes directrices actuelles en un ensemble de principes et de règles plus facilement compréhensibles par les titulaires de charges publiques, le Parlement et la population, et pouvant être adaptés aux diverses responsabilités de ces titulaires, ce qui entraînerait une meilleure uniformité d'application. Nous croyons que nos recommandations, s'il leur est donné suite, n'entraîneront pas un accroissement marqué du fardeau bureaucratique ni des dépenses d'administration.

Nous avons été conscients de la double responsabilité que comportait notre mandat relativement au besoin de garantir l'intégrité de l'appareil gouvernemental et la confiance que lui accorde le public, ainsi qu'à la nécessité d'attirer au service de l'État des personnes du plus haut calibre et de tous les secteurs de la société".

Nous sommes tous deux entrés au Cabinet, l'un en 1957 et l'autre en 1963, à une époque où il n'existait pas de lignes directrices écrites pour les ministres, pas plus d'ailleurs que pour les personnes nommées par le gouverneur en conseil. (Plusieurs ministères avaient bien des consignes écrites, mais aucune ne s'appliquait à l'ensemble de la fonction publique.) Il était entendu que les ministres devaient démissionner de tout emploi ou poste d'administrateur en dehors du gouvernement et prendre les mesures qu'ils jugeaient nécessaires pour éviter les conflits d'intérêts; ils n'étaient cependant pas tenus de se dessaisir des actions qu'ils détenaient en les vendant ou en les plaçant en fiducie. Il n'existait pas non plus de règles écrites concernant les activités des anciens titulaires de charges publiques. La seule règle était celle de l'honneur.

D'après nos souvenirs, les normes de conduite au sein de l'administration publique fédérale étaient à l'époque aussi élevées qu'elles le sont actuellement, et le besoin d'attirer des personnes du plus haut calibre au service de l'État se faisait tout autant sentir il y a 25 ans. La différence, c'est qu'aujourd'hui il existe des lignes directrices. D'ailleurs, une des raisons invoquées, surtout par certains gens d'affaires, pour ne pas s'engager au service du public est que les lignes directrices actuelles ajoutent aux sacrifices financiers auxquels il faut consentir pendant l'exercice d'une charge publique et créent certaines difficultés lorsqu'ils veulent reprendre leurs anciennes occupations au terme de leur carrière publique.

Au Canada un bon nombre d'hommes et de femmes ont accumulé de longues périodes de service ininterrompu en tant que députés, dont plusieurs ont agi pendant un certain temps à titre de ministres de la Couronne. Mais contrairement à d'autres pays, il n'y a pas chez nous beaucoup de "politiciens professionnels," c'est-à-dire de personnes qui font toute leur carrière en politique (à moins qu'elles soient temporairement boudées par

l'électorat). Au Canada, le taux de remplacement des députés aux élections est élevé. Par conséquent, le Cabinet a toujours été composé en grande partie de personnes ayant passé une bonne partie de leur vie comme professionnels dans les affaires ou agriculteurs et souhaitant y retourner au terme de leur carrière politique, qu'elles y mettent fin volontairement ou involontairement.

Mais la démocratie canadienne ne s'en porte que mieux. Il ne serait pas souhaitable, en effet, que la majorité de nos gouvernants soient un groupe exclusif de professionnels n'ayant aucun intérêt majeur à défendre dans la société, ou des personnes tellement peu engagées socialement et ayant une optique si unidimensionnelle qu'elles n'auraient aucun conflit d'intérêts. Nous insistons sur le fait que ce n'est pas l'existence de conflits d'intérêts - un phénomène normal et même souhaitable - qui présente un problème, mais plutôt le besoin de leur apporter des solutions conçues de façon à favoriser l'intérêt public.

On doit continuer de retrouver parmi nos gouvernants des personnes prêtes à abandonner des activités privées florissantes pour oeuvrer pendant un certain temps au service de l'État. Il ne suffit plus de dire que les citoyens qui ont réussi et ont le sens du devoir public devraient être prêts à accepter les sacrifices inhérents à l'exercice d'une charge publique, quels qu'ils soient. Rien ne justifie l'existence de règles qui accroissent inutilement les sacrifices déjà considérables découlant du poste en cause.

Nous ne mettons pas en doute la nécessité de codifier des procédures et des règles de conduite propres à minimiser les conflits d'intérêts. Nous reconnaissons que l'attitude du public à l'égard du gouvernement a beaucoup changé depuis l'époque où nous sommes entrés au Cabinet. Ce changement d'attitude est sans doute attribuable à plus d'un facteur, mais nous n'avons pas besoin ici de savoir lesquels ont été les plus déterminants. Il suffit en réalité de considérer l'existence de normes de conduite strictes que les titulaires de charges publiques doivent respecter. C'est dans ce contexte que nous avons envisagé cette question.

La portée et la rigueur des normes de conduite touchant les titulaires de charges publiques au sein de l'administration fédérale dépassent souvent celles des provinces canadiennes et des autres démocraties parlementaires que nous avons examinées. Il est très difficile sous ce rapport de comparer le Canada avec les États-Unis, étant donné que le système d'éthique américain est très différent du nôtre, qu'il est fort complexe et qu'il prend la forme législative typiquement américaine prévoyant des sanctions spécifiques pour toutes infractions et assurant tous les droits afférents aux prérogatives d'action en justice.

Un retour à la situation qui prévalait à l'époque où nous sommes entrés au Cabinet est manifestement impossible. Les lignes directrices émises depuis n'ont peut-être pas haussé le niveau déjà élevé des normes de conduite des titulaires de charges publiques au sein du gouvernement fédéral du Canada ni contribué réellement à accroître la confiance du public envers le gouvernement, mais une telle appréciation est difficile à faire. En un sens, l'expérience d'une décennie ne permet pas encore de rendre un jugement définitif quant à leur valeur réelle. Nous ne doutons pas que des directives écrites offrent des avantages marqués (concrets et virtuels), quoique leur effet pourrait être difficile à quantifier. D'ailleurs, elles sont maintenant perçues comme étant nécessaires, et nous croyons que leur retrait à présent ne contribuerait qu'à diminuer la confiance accordée au gouvernement.

Cependant, le gouvernement a tout à gagner à rechercher une façon simple, juste et raisonnable d'aborder les questions d'éthique, particulièrement celles qui ont trait aux conflits d'intérêts. La sagesse nous dicte d'éviter d'imposer des restrictions inutilement sévères pouvant décourager des personnes de haut calibre et d'une grande intégrité de rechercher, d'accepter ou de conserver une charge publique. Imposer des règles excessivement strictes ne contribue nullement à accroître la confiance envers le gouvernement et peut même aller à l'encontre du but recherché, par exemple lorsque de bonnes gens sont amenés à les contourner parce que leur application au pied de la lettre créerait des situations manifestement injustes. Il ne s'agit pas ici d'une simple allégation théorique. Nous avons été saisi à maintes reprises d'exemples démontrant que l'absence dans le système actuel d'un élément d'adaptabilité aux circonstances particulières plutôt que l'application universelle de certaines règles n'était pas raisonnable, aucune différenciation n'étant faite entre l'important et l'accessoire ni entre la lettre et l'esprit de la loi. Ce sujet est examiné plus à fond dans le corps du rapport.

e) Organisation et activités du Groupe de travail

En raison de sa complexité, le sujet qui nous intéresse a nécessité l'examen approfondi de nombreuses questions. L'éthique au sein d'un gouvernement moderne, soulève d'importantes questions tant sur le plan philosophique qu'administratif. C'est grâce à un effort soutenu que la tâche a pu être menée à bien en relativement peu de temps.

Après notre nomination à la coprésidence du Groupe de travail, l'avocat torontois J. Patrick Boyer, auteur de plusieurs livres traitant d'aspects juridiques et historiques de questions que nous devions examiner et ayant oeuvré auprès des gouvernements fédéral et provincial, a été nommé directeur exécutif du Groupe de travail. M. Boyer s'est chargé, en plus de ses autres responsabilités, de la rédaction d'une grande partie du

présent rapport, et nous tenons à le remercier de son excellent travail.

D'autres dispositions ont été prises pour détacher auprès du Groupe de travail plusieurs membres de la Fonction publique fédérale ayant une connaissance particulière des questions relatives aux conflits d'intérêts, dont Judy Lockett, chef de la Section de l'examen des politiques du Groupe des politiques et des procédures du Secrétariat du Conseil du Trésor, qui a exercé les fonctions d'adjoint spécial du directeur exécutif et assumé diverses tâches de recherche et d'administration pendant toute la durée des travaux du Groupe de travail.

Michael Vaughan, premier analyste de politiques à la Commission de la Fonction publique, et Brian Tannenbaum, du Bureau du vérificateur général, nous ont aussi été prêtés temporairement pour l'exécution de travaux de recherche. Nous avons en outre bénéficié des services de deux hauts fonctionnaires à la retraite, Dino Cawadias et Russell Steward pour des travaux de consultation et de recherches sur certains domaines à l'étude. L'agent d'administration du Groupe de travail a été Alan Quinn, de l'Administration du pipe-line du Nord. Thelma Nicholson du Bureau du Conseil privé a assumé les fonctions de secrétaire-archiviste pendant toute la durée de nos audiences et Jim Ferguson, lui aussi du BCP, s'est occupé de certains aspects administratifs. Pauline Sabourin a fait fonction d'adjointe administrative. Denise Goudreau et Francine Chabot nous ont fournis des services de secrétariat exceptionnels. Enfin, Margaret Whithridge de la Commission de la fonction publique a revu le texte définitif du rapport. Nous sommes reconnaissants à toutes ces personnes pour leur aide et leur travail assidu.

Pour l'exécution de notre étude, nous avons employé toutes les méthodes habituelles de collecte de renseignements. Nous avons consulté un certain nombre de fonctionnaires chargés de l'interprétation et de l'application des politiques du gouvernement fédéral en matière d'éthique. En effet, seuls les fonctionnaires en poste pouvaient nous donner une "vue de l'intérieur" des questions relatives aux conflits d'intérêts, et nous leur en sommes particulièrement reconnaissants.

Le sous-registraire général adjoint, G.J. Robert Boyle, et les membres de son personnel, notamment Peter Herbert, directeur du Groupe consultatif sur les normes de conduite, nous ont apporté par leur constante collaboration une aide inestimable pendant toute notre étude.

Un avis expliquant le mandat du Groupe de travail et invitant la population à lui présenter des mémoires écrits ou à communiquer avec lui par téléphone a été publié à deux occasions dans 111 quotidiens et 6 journaux spécialisés du Canada. Cette annonce a suscité un intérêt considérable et bon nombre de

suggestions utiles, lesquelles ont été incorporées au rapport. Nous avons aussi reçu diverses plaintes sur des points particuliers, ainsi que plusieurs allégations et quelques suggestions qui ne s'inscrivaient pas dans notre mandat. Nous avons répondu à tous ceux et celles qui ont communiqué avec nous.

Nous avons écrit à tous les ministres, députés, sénateurs, sous-ministres et chefs d'organismes en poste pour leur demander leur opinion sur la question. Nous avons aussi écrit à certains anciens titulaires de charges publiques.

Nous nous sommes en outre enquis de l'opinion de 65 sociétés de la Couronne, de 134 sociétés et entreprises privées et de 15 agents de négociation représentant le secteur public ou le secteur privé.

De nombreuses entrevues ont eu lieu avec ceux qui ont répondu aux lettres et à l'annonce publiée dans les journaux, ainsi qu'avec certaines personnes qui, au cours des dernières années, ont été l'objet d'allégations de conflits d'intérêts.

À maintes occasions au cours des derniers mois, nous nous sommes entretenus, de façon informelle, avec des personnes des secteurs public et privé, au sujet de questions touchant les conflits d'intérêts, y compris certaines de nos idées. Autant d'idées et de suggestions découlent de nos entretiens avec des personnes d'expérience et bien informées que de nos études empiriques de la documentation.

Nous avons en outre obtenu et examiné les codes d'éthique et de conduite de diverses associations professionnelles du Canada et de plusieurs douzaines d'entreprises canadiennes.

Nous avons entrepris de nombreuses activités de liaison avec les États-Unis afin d'étudier le cadre législatif de leur système ainsi que son fonctionnement jusqu'ici. Les pratiques des gouvernements du Royaume-Uni, de l'Australie et de la Nouvelle-Zélande ont été étudiées à partir des documents et rapports reçus, et ont été évaluées en regard des besoins du Canada. Nous avons également examiné les mesures prises par les provinces et municipalités canadiennes.

Nous voudrions transmettre nos sincères remerciements à tous ceux et celles qui ont pris le temps de participer aux audiences et de présenter des mémoires au sujet des conflits d'intérêts; aux fonctionnaires qui nous ont fait parvenir de la documentation sur les règles relatives aux conflits d'intérêts dont ils assurent eux-mêmes l'application; aux sociétés de la Couronne qui nous ont communiqué les renseignements que nous leur avons demandés; aux fonctionnaires américains, qui se sont montrés très coopératifs, et aux représentants des provinces et des municipalités qui nous ont fait parvenir de l'information. Nous donnons à l'annexe A une liste de ces individus.

Nous avons par ailleurs analysé les études faites sur le sujet au cours des quinze dernières années, ainsi que les rapports et ouvrages des spécialistes de ce domaine. Nous avons aussi étudié l'évolution historique de l'éthique dans la société moderne.

Nous avons discuté de nos méthodes et de nos recommandations avec un bon nombre de personnes reconnues comme étant des autorités en la matière et nous avons notamment bénéficié des suggestions de Kenneth Kernaghan, professeur de sciences politiques et d'administration à l'Université Brock, Robert Jackson, professeur de sciences politiques à l'Université Carleton, Jeremy Williams, professeur de droit à l'Université de l'Alberta, Roswell B. Perkins, président du "Special Committee on Federal Government Service and Conflict of Interest" du Barreau de la ville de New-York, et Michael M. Harmon, professeur d'administration publique à l'Université George Washington de Washington (D.C.).

f) Organisation du rapport

Comme vous nous aviez déjà indiqué dans votre lettre votre intention de publier notre rapport, Monsieur le Premier ministre nous avons conçu sa présentation de façon à en faciliter l'examen par le public. Nous y avons inclus, en plus de notre analyse, de nos conclusions et de nos recommandations, divers éléments de documentation et de référence, y compris un historique des lois et des lignes directrices relatives aux conflits d'intérêts au niveau fédéral; un résumé de celles-ci; et une revue des politiques adoptées à cet égard et des normes de conduite en vigueur dans d'autres juridictions.

Sur le plan de la terminologie, nous utilisons le terme "titulaire de charge publique" pour désigner toute personne qui oeuvre dans le secteur public fédéral ou qui est rémunérée par la Couronne du chef du Canada. Dans certains cas, l'expression "titulaire non élu de charge publique" est utilisée pour désigner toutes ces personnes, à l'exception des ministres, des secrétaires parlementaires et des membres du personnel soustrait des ministres. Ces expressions sont définies en détail dans le projet de Code d'éthique qui figure au chapitre 12 d) du présent rapport.

CHAPITRE 2

THÈSE ET THÉORIE

a) Double thème: intégrité et compétence

Deux thèmes qui se tiennent et sont d'égale importance ont régulièrement été repris au cours des travaux du Groupe de travail.

Selon le premier, la conduite de chacun au gouvernement fédéral canadien doit être au-dessus de tout soupçon. Selon le second, le gouvernement fédéral doit pouvoir attirer le personnel dont il a besoin pour satisfaire aux exigences d'un gouvernement contemporain. En d'autres mots, le premier thème suppose l'intégrité, le second, la compétence.

Ces deux thèmes, Monsieur le Premier ministre, vous les avez vous-même énoncés dans la lettre que vous nous avez adressée: "Il est en effet essentiel que les Canadiens aient confiance dans leur gouvernement, dans son appareil et dans le calibre des personnes qui se consacrent au service de l'État. C'est la qualité même du gouvernement du pays qui en dépend."

L'intégrité du gouvernement n'est jamais une situation déterminée; elle évolue en fonction des grands programmes gouvernementaux, de l'attitude des gens dans l'administration publique, de la perception générale que le gouvernement se préoccupe des véritables besoins de la société et, bien sûr, des questions de conflits d'intérêts. L'intégrité d'un gouvernement est une qualité intangible, et en tout temps d'aucuns y croiront tandis que d'autres la mettront en doute.

Au Canada le gouvernement fonctionne dans une large mesure en s'appuyant sur le consensus, c'est-à-dire que la société désire ou du moins accepte que le secteur public exerce les activités essentielles pour son compte. Comme il y a consensus plutôt que coercition, il est essentiel que les citoyens gardent confiance en l'intégrité du gouvernement. Pour leur part, les titulaires de charges publiques, tant élus que nommés, doivent quotidiennement mériter cette confiance par chacun de leurs actes.

Au cours des années d'après-guerre, l'idée que se faisait la population des normes de conduite exigibles des représentants de l'État s'est modifiée considérablement, quoique graduellement. Cette évolution s'est accélérée ces dernières

années. Comme l'a fait remarquer le professeur Kenneth Kernaghan, ce facteur a beaucoup contribué à modifier le scénario de la réaction aux cas de comportements répréhensibles.[1] Certains types de conduites qui autrefois étaient tolérés ou n'étaient condamnés que légèrement chez les fonctionnaires sont maintenant jugés inacceptables ou passibles d'une punition. Tel est particulièrement le cas dans le domaine des conflits d'intérêts.

La gravité d'un conflit d'intérêts même potentiel a été reconnue dans un jugement rendu en 1974 en vertu de la Loi sur les relations de travail dans la Fonction publique[2]. L'arbitre a maintenu la suspension d'un employé fédéral qui avait créé une entreprise de services pouvant le mettre dans une situation de conflit d'intérêts en raison de ses fonctions officielles. Le Conseil a estimé que l'apparence de conflit était suffisante pour constituer un conflit. Selon l'arbitre,

> il n'est pas suffisant pour le fonctionnaire ou ses associés d'être convaincus de leur innocence et de leur intégrité. Il n'est pas nécessaire non plus de prouver qu'ils ont été déloyaux envers leur employeur. Même en l'absence de preuve d'écart de conduite délibéré, un conflit d'intérêts ou l'apparence d'un tel conflit peut facilement être reconnu par un citoyen sensé comme étant contraire à la politique publique.[3]

Ce haut niveau de qualité de la vie publique, où même l'apparence d'un conflit peut être considérée comme constituant une situation de conflit d'intérêts, est à notre avis, révélateur du fait que la société canadienne contemporaine se montre vivement consciente du problème que constitue le conflit d'intérêts. Nous convenons que,

> dans une certaine mesure, le conflit d'intérêts est un problème de luxe, une question dont seule une société par ailleurs solide et sans inquiétude peut se permettre de se préoccuper. C'est uniquement lorsque les larcins les plus flagrants ont été réduits à des limites tolérables et que la vénalité non dissimulée est une chose assez rare pour scandaliser qu'il est possible pour un

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1 Kenneth Kernaghan, Comportement professionnel : directives à l'intention des fonctionnaires, Toronto, Institut d'administration publique du Canada, 1975, p. 4.

2 Décision rendue en vertu de la Loi sur les relations de travail dans la Fonction publique dans l'affaire opposant Maurice Dudley Atkins et le Conseil du Trésor (ministère des Transports), 21 mars 1974, dossier 166-2-889.

3 Ibid. p. 30.

> gouvernement de se concentrer sur les risques et d'essayer de lutter contre la corruption à la source. [4]

Dans quelle mesure cependant doit-on s'offrir ce luxe? Dans sa livraison du 15 juillet 1983, The Wall Street Journal a traité de plusieurs affaires courantes de la scène politique américaine mettant en cause la question de l'éthique. Dans un éditorial intitulé "Ethicsgate", le journal laissait entendre que les préoccupations dans ce domaine commençait à être exagérées:

> Arrive un moment où la recherche excessive de la vertu devient irresponsable, même si elle n'est pas teintée d'hypocrisie, comme c'est si souvent le cas. C'est un aspect que nous ne devons pas perdre de vue, nous, en tant que société, c'est-à-dire les adversaires politiques, les électeurs, les éditeurs, les lecteurs de livres et de journaux, les journalistes et les téléspectateurs. Nous avons pris l'habitude de faire preuve d'absolutisme moral à l'égard de quiconque devient une vedette. Nous nous étonnons ensuite que les meilleurs hommes et femmes fuient la vie publique, que ceux qui y viennent soient souvent des personnalités bizarres, des papillons attirés par la flamme.

De notre côté de la frontière, on a également exprimé cette même idée "que la recherche excessive de la vertu" frise l'irresponsabilité. Nous avons reçu plusieurs mémoires dans lesquels le "journalisme d'enquête", exercé de façon irresponsable, était accusé d'avoir porté atteinte à l'intégrité du gouvernement dans des cas où la chose était non justifiée. On nous a dit en outre que cette réaction excessive aux problèmes que posent les conflits d'intérêts réels ou potentiels a fait perdre à la fonction publique beaucoup de son attrait. Il s'ensuit qu'il a été difficile d'y attirer des représentants du secteur privé.

Il est toutefois admis que les médias jouent un rôle essentiel dans la "préservation de l'honnêteté du gouvernement". Ici encore un double thème se présente: un journalisme irresponsable peut causer un tort irréparable. Comme quelqu'un l'a déjà dit à un journaliste "C'est votre article, mais c'est ma vie". Les reporters qui traitent de façon inconsidérée les faits ou tirent trop rapidement leurs conclusions risquent de faire plus de tort que de bien. Par ailleurs, nous risquerions de ne pas nous préoccuper beaucoup des questions de conflits d'intérêts si ce n'était des médias qui les portent à l'attention du public et les attisent au point où des mesures s'imposent pour corriger la

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4 Conflict of Interest and Federal Service, Report of the Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, Cambridge, Mass., Harvard University Press, 1960, p. 6.

situation et rétablir la confiance du public envers le gouvernement. Les médias doivent autant que quiconque être soucieux de l'importance de l'intégrité du gouvernement et de la nécessité de maintenir cette intégrité lorsque la chose est justifiée.

Passons maintenant au thème de la "compétence". La taille et la complexité du gouvernement ont atteint au cours de la deuxième moitié du XX^{e} siècle un niveau sans précédent. Bien que, de l'avis de certains, il ne serait pas nécessaire que la fonction publique soit aussi grande ou que le gouvernement réglemente autant ou soit aussi actif dans le domaine des affaires, la réalité à laquelle nous devons faire face est la suivante: au 31 décembre 1983, la fonction publique fédérale[5] se composait de quelque 234 866 employés, répartis dans quelque 27 ministères et 79 conseils, organismes, tribunaux, commissions et autres. En outre, 78 sociétés de la Couronne employaient plus de 250 000 personnes, et les Forces armées canadiennes et le personnel en uniforme de la Gendarmerie royale, représentaient 100 000 personnes.

Ainsi, l'activité gouvernementale, les systèmes de réglementation et les mécanismes de contrôle gouvernementaux ont pris une véritable ampleur au Canada. Par ailleurs, le gouvernement a commencé à assumer un rôle de premier plan dans l'économie, principalement avec le concours des sociétés de la Couronne. Ces deux événements mettent en évidence une source manifeste de conflits d'intérêts. Ces activités gouvernementales en effet ne sont pas exercées par des robots ni des ordinateurs, mais par des êtres humains qui, quoique au service de l'état, ont d'autres intérêts, des parents, des amis et des ambitions.

Outre le fait que l'accroissement de l'activité gouvernementale peut engendrer de nouveaux problèmes de conflits d'intérêts, ce rôle élargi de l'État apporte une nouvelle dimension humaine importante: pour être compétent, le gouvernement doit être en mesure d'attirer les personnes les plus qualifiées et le plus brillantes du secteur privé et pouvoir adapter des techniques et des procédures considérées jusqu'alors comme étrangère à son rôle traditionnel.

Le gouvernement constate de plus en plus qu'il peut subvenir à ses besoins supplémentaires en personnel en s'adressant à l'"extérieur". Il a donc mis au point de nouvelles méthodes pour s'assurer les services de personnes hors de la fonction publique. Des ententes de travail intermittent et des dispositions de quasi-emploi sont devenues très fréquentes dans le cas des conseillers techniques, des spécialistes à temps partiel, des

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5 Ministères et organismes dont le nom figure à la Partie I de l'Annexe I de la Loi sur les relations de travail dans la Fonction publique.

conseillers rémunérés ou non, des comités consultatifs et d'entrepreneurs indépendants qui font des études ou agissent comme conseillers.

C'est à ce point que s'entrecroisent les deux thèmes, soit intégrité et compétence. La relation entre les mécanismes de contrôle qui visent les conflits d'intérêts et le processus de dotation du gouvernement est plus évidente lorsque le besoin de spécialistes est plus grand. Il peut arriver qu'un seul individu ou une seule entreprise ait la compétence nécessaire pour concevoir un produit donné de haute technologie ou en superviser la mise au point. Lorsque s'impose l'utilisation de ladite technologie, le gouvernement n'a d'autre choix que de s'adresser à ce spécialiste (ou à cette entreprise) pour lui demander son aide, quelles que puissent être ses activités économiques personnelles ou ses affiliations.[6] Le problème de la pénurie de personnel compétent ou de spécialistes dans certains domaines a été signalé, par exemple, par le juge Hyde qui a expressément reconnu que le manque d'économistes du travail inciterait probablement le gouvernement et le secteur privé à s'adresser au même petit groupe de personnes pour obtenir des avis et des conseils. Dans ce contexte, on a fait remarquer que l'application ferme des restrictions en matière de conflits d'intérêts suppose soit l'existence d'autres spécialistes ayant la même compétence, soit un choix délibéré de se contenter du moins compétent. La plupart des pays ne disposent pas des premiers et ne sont pas prêts à opter pour le second.[7]

Il convient de souligner que l'une des raisons pour lesquelles on se préoccupe de l'éthique c'est que, à l'heure actuelle, la population se fait une bien piètre image des politiciens et des titulaires de charges publiques en général. Les allégations faites contre quelques-uns ou la conduite répréhensible apparente de certains autres contribuent à perpétuer une exagération, à savoir que tous sont corrompus.

Nous en arrivons ainsi à nous poser les questions suivantes: les contraintes imposées en matière de conflits d'intérêts compliquent-elles beaucoup plus le fonctionnement du gouvernement d'aujourd'hui? Les restrictions actuelles, dont l'objectif louable est d'assurer une éthique presque irréprochable, minent-elles les efforts du gouvernement pour attirer les compétences voulues?

Ce qui empêche tout spécialement d'attirer les personnes compétentes dans la fonction publique, c'est le problème que crée la partie des directives relatives aux conflits d'intérêts qui

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6 R. V. Picard (1967), 65 D.L.R. (2d) 658.

7 Conflict of Interest and Federal Service, op. cit., p. 9.

exige le dessaisissement des investissements personnels et le renoncement à d'autres droits. Bien que des femmes et des hommes compétents puissent être disposés à accepter une rémunération inférieure dans la fonction publique, plusieurs hésitent de plus en plus à se dessaisir des placements qu'ils ont faits au cours de leur vie et des autres droits et privilèges disponibles du côté de l'industrie privée. Ces exigences de dessaisissement ont sans doute occasionné des pertes ou des difficultés financières considérables dans un certain nombre de cas et elles sont critiquables, car elles sont perçues comme étant fondées sur la prémisse que les gens sont fondamentalement dépourvus de sens moral et qu'on ne peut leur faire confiance. De l'avis de plusieurs, cette prémisse est erronée parce qu'elle suppose automatiquement que si les personnes qui entrent à la fonction publique conservent quelque partie que ce soit de leurs intérêts privés ou de leurs relations avec les milieux d'affaires, elles seront incapables de faire la distinction entre l'intérêt public et leur propre intérêt. Au contraire, si l'exercice d'une charge n'implique pas de rôle dans les portefeuilles économiques du gouvernement ou encore dans la réglementation des secteurs commercial, minier ou manufacturier de l'économie canadienne, on devrait admettre que la participation à une activité de l'extérieur qui maintient et stimule un intérêt à l'égard du secteur privé peut avoir d'énormes avantages.

Les contraintes qui existent en matière de conflits d'intérêts ont eu tendance à entraver le recrutement des candidats à certains postes supérieurs du gouvernement; elles ont aussi été un obstacle pour les partis politiques en quête de candidats à des charges publiques. Le pays se trouve actuellement aux prises avec les "retombées" de ce phénomène. Plusieurs des personnes qui exercent des charges publiques n'ont appris qu'après avoir assumé leurs nouvelles fonctions toute la portée des règles concernant le dessaisissement des avoirs, et dans certains cas, l'existence même de lignes directrices. Certaines auraient peut-être refusé pareils postes si elles avaient connu à l'avance toute la rigueur du régime. Il faut beaucoup de temps et d'énergie, même sur le plan administratif, pour amener les hauts titulaires, surtout ceux qui sont nommés par le gouverneur en conseil, à préparer des rapports détaillés et à se dessaisir d'avoirs peu ou pas du tout susceptibles d'influer sur leurs fonctions officielles, ou vice versa.

Il va de soi que l'intérêt privé ne doit jamais compromettre les affaires publiques, et dans certaines circonstances, la divulgation confidentielle ou publique est des plus bénéfiques et permet d'atteindre cet objectif. Nous ne devons toutefois pas perdre de vue que les droits à la vie privée sont en jeu et doivent être pris en compte.

Les personnes qui ont eu à subir les règles en vigueur passent maintenant le mot à leurs collègues du secteur privé et

les informent des difficultés auxquelles ils peuvent s'attendre. Il s'ensuit que les problèmes de recrutement du gouvernement fédéral seront vraisemblablement plus graves au cours des années à venir qu'ils ne l'ont été par le passé. À notre avis, la seule façon de redresser la situation consiste à établir une mesure d'équité dans les règles et à adopter une méthode bien précise pour déterminer les circonstances où leur application rigoureuse ne satisfera qu'à la lettre de la loi et non à son esprit, et par conséquent aura des effets négatifs.

Quels que puissent être les solutions adoptées pour favoriser le recrutement et, partant, accroître la compétence du secteur public, on ne doit pas oublier qu'aucun de ces deux objectifs ne peut sans aucun risque être subordonné à l'autre. Il ne faut pas que les remèdes favorables au recrutement empêchent le public d'être protégé contre toute pratique contraire à l'éthique au sein du gouvernement.

Nous convenons que

> le manque de personnel compétent constitue un risque immédiat; c'est à plus long terme qu'existe le risque de corruption et de perte de confiance en l'intégrité du gouvernement. Aucun de ces risques ne peut être toléré. Ce qu'il faut, c'est trouver un équilibre dans la poursuite des deux objectifs. L'intérêt national exige une politique intégrée pour le court et le long terme. Il faut une politique qui, sans sacrifier l'intégrité à l'opportunisme, n'empêche pas de satisfaire aux besoins pratiques de recrutement par pur moralisme. Il faut une bonne réglementation qui limite les vraies situations de conflits d'intérêts sans avoir d'effets secondaires négatifs.[8]

Nous croyons qu'il est possible d'atteindre un tel équilibre en s'inspirant des recommandations du présent rapport.

b) Un seul angle: la norme de conduite

L'expression "conflit d'intérêts", d'origine relativement récente, est peut-être trop limitée ou trop étroite pour englober convenablement l'objet de notre mandat. Bien sûr, même si dès le début nous avons été désignés comme le "Groupe de travail sur les conflits d'intérêts", vous n'utilisez pas cette expression, Monsieur le Premier ministre, dans la lettre que vous nous avez adressée, et elle n'est mentionnée dans notre mandat qu'à propos des lignes directrices actuelles sur les conflits d'intérêts. Vous utilisez plutôt le mot "conduite". L'angle

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8 Conflict of Interest and Federal Service, op. cit., p. 10-11.

unique sous lequel ces questions doivent être examinées est celui de la norme de conduite d'un individu. Par là, nous entendons évidemment l'éthique.

Certains, pour élaborer la politique gouvernementale en ce domaine, commenceraient par examiner une gamme étroite de conflits; il y en a même qui se limiteraient strictement aux critères économiques. À notre avis, il est plus positif et constructif d'aborder cette question dans une perspective plus large, plus globale de l'éthique, peu importe la situation ou le contexte dans lequel surgit un "conflit d'intérêts". Divers gouvernements ont adopté des mesures législatives et des politiques qui s'attachent trop exclusivement aux conflits d'intérêts et qui, parce qu'elles exposent en détail les multiples situations pouvant donner lieu à des conflits d'intérêts, semblent avoir perdu de vue l'idée principale, à savoir que l'éthique doit présider à la conduite des affaires de l'État. Cela veut dire, selon les normes canadiennes d'éthique, que lorsqu'il y a conflit entre un intérêt privé et l'intérêt public, le conflit doit être résolu en faveur du second, soit par démission, dessaisissement des avoirs, divulgation, refus de traiter l'affaire ou autrement.

Autrefois, au moment, par exemple, où les co-présidents du Groupe de travail sont entrés en politique, la population était plus disposée à accorder le bénéfice du doute à un ministre ou à un titulaire de charge publique. En d'autres mots, il y avait peu de doute que ces personnes feraient passer l'intérêt public avant leurs propres intérêts. Tel n'est plus le cas. La population en est venue à demander que soient prises des mesures destinées à éliminer ou à minimiser les conflits d'intérêts. L'"idée" dominant comporte donc un nouvel élément, à savoir que l'éthique doit être assurée par des règles.

Cela ne signifie pas qu'il n'y aura pas de conflits d'intérêts; nous ne pouvons pas imaginer la vie recluse et limitée qu'il faudrait vivre pour ne jamais se trouver en situation de conflit d'intérêts. Le vrai problème, c'est de savoir comment régler lesdits conflits lorsqu'ils surgissent. Dans certains cas, nous recommandons de maintenir la politique actuelle en vertu de laquelle les titulaires de certaines charges publiques (par exemple les ministres du Cabinet) doivent se dessaisir de certains biens et se dégager de certaines affiliations pour pouvoir détenir leurs fonctions; il ne s'agit là que de "médecine préventive", car cette mesure élimine à l'avance les types de conflits qui sont inévitables et prévisibles pour des ministres d'un gouvernement moderne. Dans d'autres cas, toutefois, lorsque le problème n'est ni prévisible ni susceptible d'être éliminé à l'avance, il faut recourir aux principes d'éthique pour aider les intéressés à se sortir d'une situation de conflit d'intérêts. Il convient donc, pour ce faire, d'énoncer simplement et avec conviction des règles d'éthique. Nous proposons qu'elles soient inscrites dans une loi du Parlement.

Ces règles peuvent peut-être être ramenées au seul précepte "Ne faites rien qui risque de vous embarrasser si jamais on l'apprend", mais celui-ci est probablement trop concis pour avoir sa place dans une loi du Parlement. Ce conseil constitue toutefois un excellent point de repère pour bon nombre de gens.

"Éthique", en grec "êthikos", mot tiré de "ethos" qui signifie "moeurs", en est venu à désigner un "ensemble particulier de règles de conduite", mais on peut le considérer comme quelque chose de plus profond qu'un code de conduite. Ce mot vise l'essence même de chacun, son intégrité, cette partie intangible de tout être humain qui le pousse à être et à agir quand nul ne le regarde comme si on le regardait.

L'ultime réponse aux problèmes d'éthique à l'intérieur du gouvernement consiste à faire travailler des honnêtes gens dans un milieu où l'éthique règne. Aucun recueil de lois ou de règlements ne peut, quelle que soit sa complexité, prévoir les situations innombrables où l'intégrité d'une personne ou son dévouement à la cause publique peuvent être mis en doute. Une réglementation officielle s'impose toutefois, réglementation qui pourra constituer un énoncé de politique clair prévoyant la punition de la vénalité et du double jeu, et fixer de façon générale la ligne d'éthique à suivre dans la conduite des affaires publiques.

c) Objectifs généraux et principes sous-jacents des normes de conduite

En matière de normes de conduite, au moins sept objectifs généraux et principes sous-jacents interviennent, à savoir:

1) traiter avec impartialité, justice et égalité les personnes qui transigent avec le gouvernement;

2) faire en sorte que les décisions d'intérêt public ne soient pas influencées par des considérations privées;

3) assurer l'efficacité et l'économie des activités gouvernementales;

4) maintenir la confiance du public à l'égard du gouvernement (y compris les apparences);

5) parer à tout usage d'une charge publique pouvant occasionner des avantages personnels, directement ou indirectement;

6) encourager l'adoption d'une attitude positive et professionnelle à l'égard du service gouvernemental; et

7) faciliter le mouvement d'individus entre les secteurs public et privé.[9]

d) Trois critères d'évaluation des règles et des procédures concernant les normes de conduite

Les lignes directrices et les dispositions législatives actuelles concernant les conflits d'intérêts au niveau fédéral se caractérisent entre autres par leur confusion. De grandes politiques ont été élaborées, en général, pour répondre sporadiquement à des maux particuliers. Ainsi s'est tissé un ensemble disparate de règles et de procédures dont chaque élément est peut-être tout à fait compréhensible et logique mais qui, lorsque regroupés, constituent un système d'une complexité infructueuse, injuste dans nombre de cas et parfois déraisonnable.

Ainsi, pour évaluer les règles et les procédures concernant les normes de conduite, et en particulier pour concevoir un système qui remplacera celui qui est actuellement en usage, nous adopterions comme critères trois questions qu'il importe de se poser à l'égard de toute règle ou de toute procédure, déjà en vigueur ou proposée, à savoir: "Est-elle simple? Est-elle juste? Est-elle raisonnable?" Ces trois notions, simplicité, équité et caractère raisonnable, ont toutes besoin d'être précisées.

Simplicité. Certaines des meilleures règles d'éthique (par exemple la Règle d'or : "Ne fais pas à autrui ce que tu ne voudrais pas qu'on te fît" sont énoncées de façon précise et simple.

Rien ne démontre qu'un libellé plus détaillé et plus précis de telles règles occasionnerait de fait un niveau supérieur d'éthique; en effet, il serait peut-être possible d'attester le contraire. Il semble qu'il y aura toujours un petit nombre de personnes résolues à prendre des raccourcis, à servir leurs fins égoïstes et à violer la loi. Leur offrir un jeu complexe de lois et de procédures, ce n'est que leur ouvrir des portes de sortie ou leur trouver des échappatoires pour mieux se dissimuler.

Bref, la volonté de rédiger des règles complexes pour régir l'éthique est nuisible de deux points de vue : elles ne constituent pas une aide efficace pour décourager quiconque désirerait les enfreindre, et elles entravent l'efficacité de l'enseignement des règles d'éthique aux nouveaux titulaires de charges publiques. Plus les règles seront simples, plus facilement on les comprendra, et plus difficillement on pourra y contrevenir.

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9 Voir Roswell B. Perkins, "The New Federal Conflict of Interest Law", Harvard Law Review, 76, No. 6, (April 1963), p. 1118.

Les lignes directrices relatives aux conflits d'intérêts qui sont actuellement en vigueur comprennent les codes complémentaires (voir annexe B du présent document) rédigés à différentes périodes par différentes personnes à l'intention des ministères, organismes et sociétés de la Couronne. Dans son ensemble, le système actuel est inutilement complexe. Non seulement le volume de documents est-il imposant, mais les définitions et les expressions utilisées varient souvent d'un code à l'autre. Les procédures pourraient certainement être simplifiées considérablement.

Équité. Les lignes directrices actuelles sur les conflits d'intérêts nous semblent inéquitables à la fois quant aux dispositions elles-mêmes et quant aux procédures qui en découlent.

Au moment de l'adoption des lignes directrices générales applicables à la fonction publique, en 1973, le Conseil du Trésor a invité chaque ministère, conseil et organisme à rédiger des codes complémentaires lorsque la chose était jugée à propos. Un certain nombre de ces codes ont été rédigés ultérieurement, mais non dans tous les cas. Il s'ensuit que deux titulaires de charges publiques qui occupent des postes à peu près semblables dans des ministères différents peuvent être assujettis à des règles différentes: l'un, aux seules règles d'application générale que contiennent les lignes directrices de 1973, l'autre, à la fois aux règles de 1973 et aux règles complémentaires établies pour son ministère. Cela semble inéquitable. Subsiste la difficulté de punir les contrevenants. Même si tous les codes étaient identiques, les sous-ministres et les chefs des organismes conserveraient le pouvoir de punir les coupables selon leur bon vouloir. Il serait très difficile, et plutôt inopportun, de déterminer la sévérité des mesures disciplinaires à appliquer aux diverses catégories de cas. Conformément à l'approche fonctionnelle préconisée tout au long du présent rapport, on estime que c'est le sous-ministre ou le chef de l'organisme concerné, ou encore son représentant désigné, qui est le mieux placé pour décider de la sanction appropriée à appliquer. Cette situation ressemble quelque peu à celle que l'on retrouve dans le système judiciaire où, bien que l'uniformisation des peines soit un objectif, il y aura toujours, d'un cas à l'autre, un écart qui provoquera l'application d'un jugement différent.

Sur le plan de la procédure, même dans les ministères où les règles (établies dans les codes complémentaires) sont essentiellement les mêmes, le sous-ministre d'un ministère peut favoriser la vigilance stricte (du domaine de l'éthique) tandis que celui d'un autre ministère sera peut-être comparativement indifférent au sujet et déléguera sa responsabilité en la matière. Ce qui signifiera peut-être qu'un problème semblable soulevé dans deux ministères sera traité différemment dans chaque cas. La politique gouvernementale doit être administrée par des

individus, et cette dimension humaine suscitera inévitablement des divergences tant au niveau de l'interprétation que de l'application. Il est en outre reconnu que les questions de discipline et l'application connexe des règles en matière de conflits d'intérêts doivent continuer d'être confiées dans une large mesure au sous-ministre ou au chef de l'organisme compétent. Nous tenons toutefois à souligner l'injustice inhérente quoique inévitable que crée une application différente des mêmes règles dans plusieurs ministères du même gouvernement.

Nous recommandons que ces questions de procédure demeurent la responsabilité administrative du sous-ministre (ou du chef de la commission ou de l'organisme), mais que soient appliquées les procédures recommandées plus loin dans le présent rapport, lesquelles permettront d'atteindre une meilleure équité administrative et aideront à aplanir les contradictions qui semblent exister actuellement dans les diverses pratiques ministérielles.

Caractère raisonnable. Le véritable test d'une loi, ce n'est pas la façon dont elle énoncée dans l'abstrait, mais plutôt la manière dont elle est appliquée dans des cas particuliers. Nombre des personnes assujetties aux lignes directrices actuelles sur les conflits d'intérêts nous ont dit que les règles ou principes généraux contenus dans celles-ci semblent peut-être bien, mais que, dans des cas précis, leur application a souvent des conséquences non souhaitées, et parfois même pénibles et mesquines.

Que les lecteurs du présent rapport ne se hâtent pas de conclure qu'il s'agissait de personnes malhonnêtes qui aimeraient mieux n'être pas traduites en justice, si le choix leur était donné. Au contraire, nombre de hauts fonctionnaires de grande réputation dont l'intégrité ne peut être mise en doute ont affirmé que l'application de la lettre de la loi en cette matière a pour effet de faire oublier son esprit.

Voici trois exemples.

- En vertu d'une règle stipulant qu'un titulaire de charge publique ne doit pas détenir d'actions d'entreprises de télécommunications, une employée de l'État a dû se dessaisir de dix actions de Bell Canada. À cette fin, elle a constitué une fiducie dont le coût d'établissement a dépassé la valeur des actions. Elle aurait pu vendre ses actions, mais elles avaient pour elle une valeur sentimentale. Étant donné qu'il existe plus de deux cent millions d'actions de Bell Canada, il semble inconcevable que le fait d'en détenir 10 puisse influencer l'employée d'une façon qui risque de nuire à l'intérêt public. Pourtant, la règle a dû être appliquée, d'une façon que toutes les parties en cause,

y compris les responsables de son application, ont jugé déraisonnable.

De toute évidence, le problème vient de l'absence d'une règle de minimis qui permettrait aux responsables de l'application des lignes directrices de décider quand il s'agit d'une affaire sans conséquence qui n'est pas visée par celles-ci.

Si ces responsables avaient le pouvoir de régler selon le cas les affaires visées par une règle de minimis, il leur suffirait de faire savoir à l'employé, par écrit, que la conservation de quelques actions ne va pas à l'encontre de l'esprit des lignes directrices, mais qu'il devrait signaler toute modification ultérieure de son portefeuille d'actions.

- Un autre cas concerne un titulaire de charge publique nommé par le gouverneur en conseil qui a eu des difficultés parce qu'il n'a pas été autorisé à exercer certains types d'activités financières. Quelques années avant qu'il ne soit nommé pour la première fois par décret, son père mourut en laissant un modeste héritage dont l'usufruit était donné à la mère; à la mort de celle-ci, le capital devait être partagé entre lui-même et ses deux frères. À une époque où le partage des biens avait beaucoup plus d'avantages qu'il n'en a maintenant, son père avait transféré des avoirs au nom de la mère de sorte qu'un capital équivalant à la valeur en capital de la succession était détenu au nom de la mère. À la mort de celle-ci, à moins d'un changement dans les arrangements conclus, ses biens iraient au titulaire de la charge publique et à ses deux frères.

  Pour des raisons administratives, ces avoirs ont été traités comme un fonds unique. Le titulaire, sa mère et ses frères étaient fiduciaires de la succession du père et tous s'intéressaient à la gestion de l'ensemble du fonds. Les avoirs qui composaient le fonds étaient administrés en vertu d'un contrat de gestion par une importante société canadienne de placements qui avait tout pouvoir pour agir dans les limites des directives relatives aux placements qui faisaient partie du contrat. Le titulaire et ses frères rencontraient chaque année un représentant de la société pour étudier le rendement, discuter des directives concernant les placements et, le cas échéant, les modifier et étudier les perspectives de l'année à venir.

  Ces renseignements ont été communiqués comme prévu au sous-registraire général adjoint, responsable de l'application des lignes directrices, qui a fait savoir

au titulaire qu'il devrait s'abstenir de gérer des actions ou des titres de sociétés cotés en bourse ou "... de donner des avis concernant ces actifs". Il lui a conseillé de ne pas participer aux entretiens avec le représentant de la société concernant la politique de placement ou l'annulation du contrat si le rendement de la société était jugé insatisfaisant (dans le contexte du commerce des actions cotés sur le marché boursier.) La succession et les placements de sa mère avaient une valeur totale beaucoup inférieure à un million de dollars. Le portefeuille était constitué d'actions ou de titres de sociétés cotés en bourse et il était bien équilibré, de sorte que les intérêts détenus dans n'importe quelle société étaient minimes. Sa mère n'avait aucune expérience des affaires; il était donc normal que ses frères et lui, en leur qualité de co-fiduciaires et de légataires universels, prennent un intérêt au moins minimal dans la gestion efficace du fonds.

Dans leur état actuel, de conclure cette personne, les lignes directrices ne laissent pas suffisamment la chance aux titulaires de charges publiques d'exercer leur jugement et leur bon sens lors de l'analyse des situations possibles de conflits d'intérêts. Elles ne tiennent pas compte non plus du fait que les obligations et les intérêts familiaux normaux pourraient être exclus de certaines restrictions courantes.

Pour faire état des circonstances de ce deuxième exemple, il semble de nouveau raisonnable d'appliquer une règle de minimis qui pourrait être "graduée" selon les différents niveaux ou montants en cause. Elle pourrait s'appliquer de façon à permettre la détention directe d'un portefeuille et la participation à la gestion d'avoirs, jusqu'à concurrence d'une somme donnée qui pourrait être indexée et qui permettrait le type d'intérêt et de participation qu'avait ce titulaire lorsque, en définitive, la plus grande partie de la responsabilité en matière de gestion est confiée, par contrat écrit, à un gestionnaire professionnel. Les dispositions concernant l'emploi abusif de renseignements obtenus dans l'exercice de la charge publique pourraient être inscrites dans ce genre d'accord.

- Le troisième exemple concerne une personne nommée par le gouverneur en conseil, qui a eu elle aussi des difficultés parce qu'elle était chargée de gérer une succession familiale. Ce qui l'a le plus exaspérée, c'est toute la "bureaucratie" en jeu, le temps qu'elle a dû passer avec des représentants du sous-registraire général adjoint, et le gros dossier de correspondance

qui a été constitué sur des questions sans importance parce qu'aucun des responsables de l'application des lignes directrices n'avait le pouvoir nécessaire pour statuer sur des questions de minimis.

Nous ne voulons pas donner l'impression en terminant que l'inflexibilité est de rigueur chez le sous-registraire général adjoint; bien au contraire. Beaucoup ont loué la souplesse et le discernement dont il a fait preuve pour faire respecter l'esprit de la loi. Nous ne blâmons pas le sous-registraire général adjoint; ce sont plutôt certains aspects des lignes directrices qu'il est tenu d'appliquer qui sont causes de problèmes.

e) La nature d'un conflit d'intérêts

Lorsque les intérêts privés d'une personne ne coïncident pas avec ceux de ses fonctions et responsabilités officielles au gouvernement, il y a conflit d'intérêts. C'est ce point de croisement d'intérêts concurrents qui nécessite une analyse.

Dans les cas extrêmes, l'intérêt privé pourra comporter un motif criminel qui amènera l'individu à tenter d'utiliser un poste ou un renseignement confidentiel qu'il aura obtenu au gouvernement d'une façon interdite par la loi. Alors entreront en jour les dispositions du Code criminel qui traitent de corruption et d'influence indue mettant en cause des représentants de l'État. Même lorsque la tentative de corruption émane de quelqu'un en dehors du secteur public, elle ne peut réussir que lorsqu'un fonctionnaire ou titulaire de charge publique succombe à l'offre et participe à un acte illégal; ce qui, normalement, suppose une intention criminelle de sa part.

Si nous poursuivons dans cette même ligne de pensée, en nous éloignant quelque peu de ces cas extrêmes où l'intention criminelle entre en jeu, nous arrivons à une autre catégorie d'infractions, également visée par le Code criminel; il s'agit de l'acceptation d'un cadeau par un titulaire de charge publique, geste qui, selon la loi, peut être considéré comme constituant un conflit d'intérêts même en l'absence d'une mauvaise intention. L'acceptation d'un cadeau ou d'un pot-de-vin suffit pour constituer l'infraction, car celle-ci est considérée comme le fondement de l'ingérence dans les affaires publiques contre rétribution.

Dans la même ligne se situent ensuite les interactions entre les intérêts publics et les intérêts privés non criminels, soit les cas où les intérêts économiques ou autres du fonctionnaire ou du titulaire de charge publique risquent d'influer sur les fonctions officielles que celui-ci doit exercer.

Il n'est pas nécessaire que les intérêts publics et les intérêts privés se trouvent en concurrence ou en conflit pour qu'existe un problème d'éthique; l'intérêt public peut aussi être trahi dans le cas où l'intérêt privé d'un titulaire de poste coïncide si bien avec celui-ci que les deux se confondent et qu'en servant le premier l'intéressé sert aussi le second. On ne peut condamner pareils arrangements dans l'abstrait, mais "conflit d'intérêts" peut dans certains cas signifier "compatibilité d'intérêts". Lorsque des intérêts économiques sont en jeu notamment, il y a risque que l'exercice d'une charge publique donne lieu à plus qu'il n'y paraît.

En suivant toujours ce continuum où intérêts publics et intérêts privés se croisent, nous arrivons finalement à l'extrémité opposée à celle où les conflits comportent une intention criminelle, soit aux situations où il n'y a qu'apparence de conflit. C'est la zone la plus nébuleuse qui existe, bien qu'elle soit elle aussi visée par des lois. Par exemple, des dispositions légales interdisent aux fonctionnaires de participer à des activités politiques car une telle participation semblerait compromettre leur capacité future de s'acquitter des devoirs de leur charge. Il existe aussi de la jurisprudence sur la question, entre autres un jugement rendu en vertu de la Loi sur les relations de travail dans la Fonction publique, dans l'affaire opposant Atkins et le Conseil du Trésor, en 1974, jugement qui a reconnu la gravité d'un conflit d'intérêts même éventuel en maintenant la suspension dont avait été l'objet un fonctionnaire fédéral parce qu'il avait créé une entreprise de services susceptible d'entrer en conflit avec ses fonctions officielles. Il existe enfin une politique, énoncée notamment dans les lignes directrices originales sur les conflits d'intérêts (décret C.P. 1973-4065), selon laquelle tout fonctionnaire doit, dans l'exercice de ses fonctions, agir et sembler agir dans l'intérêt du public.

Au-delà de cet éventail de conflits d'intérêts se trouve une gamme d'activités qui seraient considérées contraires à l'éthique, qu'elles soient exercées par des titulaires de charge publique ou toute autre personne. Par ailleurs, certaines actions qui sont visées par les multiples règlements sur les conflits d'intérêts, dans leur état actuel, ne nous semblent ni immorales ni malhonnêtes d'un point de vue subjectif ou personnel.

Dans ce vaste domaine que constituent l'éthique et la conduite humaine, notre intérêt se limite au problème permanent et endémique de tous les gouvernements, soit celui que soulève le conflit entre la vie privée et la vie publique de leurs représentants. Certains spécialistes des conflits d'intérêts au gouvernement ont choisi de se limiter aux conflits qui existent entre les devoirs des titulaires de charges publiques et leurs intérêts économiques personnels. Pourtant, les motifs d'ordre économique ne sont pas les seuls qui poussent l'individu à agir,

et nous préférons poser sur la question un regard plus large. Nous ne voulons pas détailler tous les types d'intérêts privés (par exemple économiques, familiaux, religieux, partisans, raciaux, sexuels, institutionnels, et autres) susceptibles de motiver les personnes; nous croyons en effet plus sage de nous concentrer sur l'éthique dans des situations où les intérêts publics et les intérêts privés (de quelque nature qu'ils soient) s'entrecroisent.

Ici encore, il convient de limiter notre définition des "conflits d'intérêts". C'est ainsi qu'en traitant de la Canadair en novembre dernier le Comité permanent de la Chambre des communes sur les comptes publics[10] a attiré l'attention sur le problème des "conflits de tâches" dans les termes suivants:

> Votre Comité est très inquiet du rôle qu'ont dû jouer les représentants de l'actionnaire, à la fois en tant que membres du conseil d'administration et en tant que fonctionnaires conseillers du Ministre. Il en est résulté un conflit de tâches, car:
>
> i) en tant qu'administrateurs, ces fonctionnaires devaient représenter les vues du Ministre; et
>
> ii) en outre, au nom du conseil d'administration, ils devaient tenter d'influer sur les hauts fonctionnaires du ministère pour obtenir l'aide financière dont Canadair avait besoin.
>
> De l'avis du Comité, ces conflits de tâches ont considérablement entamé l'objectivité du conseil d'administration sur le plan des décisions, ainsi que son aptitude à rendre compte à l'actionnaire. De plus, en tant que représentants du gouvernement, ces personnes ont pu avoir une influence disproportionnée sur les décisions prises par le conseil d'administration.

Bien que cette question de "conflit de tâches" soit importante, nous l'excluons de la définition du "conflit d'intérêts" car nous estimons qu'elle ne concerne pas l'éthique mais plutôt l'organisation structurelle qui amène certaines personnes au sein des sociétés de la Couronne à servir deux maîtres. Ce critère du "caractère raisonnable" a été soigneusement choisi et la notion de souplesse a été rejetée dans ce contexte. Dire qu'en matière de conflits d'intérêts les règles devraient être souples susciterait la méfiance de la population qui considérerait cette approche comme une formule permettant de

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10 Vingt-deuxième rapport (Rapport sur Canadair) du Comité permanent de la Chambre des communes sur les comptes publics, déposé le 17 novembre 1983, p. 2.

plier les règles au besoin pour faire plaisir aux amis du gouvernement ou encore pour satisfaire aux besoins administratifs de la fonction publique, ce qui n'est pas l'objectif. Nous voulons plutôt faire en sorte que les règles qui existent puissent être appliquées d'une manière telle que tous les intéressés, soit les parties directement concernées et les membres du grand public, seront convaincus de la probité de l'administration publique.

Si les hommes et les femmes intègres et bien intentionnés du secteur public en viennent à juger que les règles sont d'application si difficile qu'elles sont ridicules, ils pourraient les violer sans trop de scrupules. De fait, ce qu'il y a d'ironique, c'est que ces personnes intègres pourraient s'estimer justifiées de contourner lesdites règles en omettant de divulguer certains renseignements ou en négligeant de se dessaisir de certains intérêts. Bref, il existe un seuil de tolérance au-delà duquel on ne peut imposer des règles de ce genre sans que la démarche ne produise d'effets négatifs. Cela est particulièrement vrai lorsque l'on a affaire à un grand nombre de personnes qui ont le sens civique et font de leur mieux pour s'acquitter de leurs charges publiques et vivre en harmonie avec leurs nombreux intérêts personnels et privés. Nous tentons de résoudre ce dilemme en veillant à ce que les règles, notamment les procédures de mise en oeuvre pour minimiser les conflits d'intérêts, soient raisonnables.

CHAPITRE 3

CONDUITES MALSÉANTES POUR LES TITULAIRES DE CHARGES PUBLIQUES

a) Nécessité d'énoncer clairement les activités prohibées

Puisque nous avons choisi d'aborder le sujet en termes d'éthique de la part des titulaires de charges publiques, il va de soi de traiter des activités et des comportements que nous jugeons contraires à l'éthique. Il ne suffit pas d'affirmer qu'il faut agir d'une façon conforme à l'éthique; il faut en outre énoncer avec concision les activités prohibées. Il y a lieu aussi de cerner les limites d'acceptabilité des activités permises, en fonction desquelles chacun pourrait régler sa conduite.

Nous avons déjà insisté sur le fait qu'il ne faut pas rédiger des règles trop précises, parce qu'il est alors difficile à la fois de faire comprendre aux titulaires de charges publiques la nature des règles et de prévoir toutes les formes répréhensibles de conduite que peut concevoir l'imagination de l'être humain.

C'est pourquoi les genres ou les catégories de comportements inacceptables sont énoncés d'une façon plutôt générale pouvant englober toutes les sortes de difficultés qui pourraient surgir. Néanmoins, leur simplicité les rend pertinentes dans tous les cas particuliers.

La ligne de pensée suivie est celle que préconise le secrétaire du Conseil du Trésor, G.F. Osbaldeston, dans sa circulaire du 31 décembre 1973 adressée aux sous-ministres et aux chefs des organismes et traitant des normes de conduite pour les fonctionnaires:

> Lorsqu'il s'agit d'élaborer des lignes directrices, la première question qui se pose est de savoir quels doivent en être la portée et le degré de précision, et si une abondance de détails aiderait les employés à localiser les domaines possibles de conflit. Nous croyons qu'un ensemble détaillé de lignes directrices, dans le décret, ne convenait pas et n'était pas souhaitable. Tenter d'identifier la totalité des domaines possibles de conflit aurait été une tâche de grande envergure qui n'aurait jamais été vraiment complète et qui aurait nécessité des révisions et des

interprétations constantes. Nous avons cru bon d'aborder la question d'une façon plus pratique en établissant certains principes dont la violation entraînerait manifestement une situation de conflit d'intérêts. Avec la publication de ces principes, une ligne générale se trouve établie. Il devient possible maintenant d'examiner à fond les situations effectives afin de déterminer si les principes sont respectés.

b) Neuf formes de comportements contraires à l'éthique

Des neuf formes de comportements décrites ici, les six premières sont contraires à l'éthique, soit: tractations de la part d'un titulaire de charge publique, transfert facultatif de valeurs économiques d'une source privée à un titulaire de charge publique, aide accordée par les titulaires de charges publiques aux personnes physiques et morales dans leurs raports avec le gouvernement, aide accordée par les anciens titulaires de charges publiques aux personnes physiques et morales dans leurs rapports avec le gouvernement, avantages personnels découlant de renseignements obtenus dans l'exercice de fonctions officielles, et usage privé des biens du gouvernement.

Les trois autres formes de comportements bien que du domaine de l'activité personnelle ne conviennent pas aux titulaires de charges publiques, à savoir: activité politique partisane de la part des titulaires non élus de charges publiques, critique des politiques gouvernementales et conduite indigne dans un poste public. Elles risquent même de donner lieu à des conflits d'intérêts, car les opinions et les pratiques personnelles ou privées d'un individu peuvent se manifester d'une façon inappropriée dans l'exercice de ses fonctions officielles.

Ces neuf formes de conduite contraires à l'éthique ou malséantes seront maintenant traitées en détail.

1. Tractations de la part d'un titulaire de charge publique

Nous croyons qu'il est manifestement inacceptable et contraire à l'éthique que le titulaire d'une charge publique prenne, dans l'exercice de ses fonctions, des mesures qui l'amènent à transiger en même temps avec lui-même à titre privé.

Cela se produirait par exemple lorsqu'un titulaire de charge publique participerait à l'adjudication d'un marché à une entreprise dont il est propriétaire, seul ou avec d'autres. Il y aurait également conflit dans le cas où un scientifique ou un expert engagé comme consultant par le gouvernement préparerait le devis d'un appareil hautement spécialisé que seule sa propre entreprise serait vraiment en mesure de réaliser.

Ce concept est déjà de rigueur pour les membres du Cabinet puisque les lignes directrices à l'intention des ministres de la Couronne leur interdisent un certain nombre d'activités ayant pour effet de dissiper la possibilité qu'un ministre traite avec lui-même, de quelque façon que ce soit, à titre privé. Par exemple, une fois nommés, les ministres doivent cesser de pratiquer leur profession, de gérer ou d'exploiter une entreprise ou un commerce, ou de gérer des biens, à l'exception des biens exemptés ou pouvant être divulgués. Ils doivent cesser d'agir comme conseillers rémunérés et ne peuvent conserver ni accepter un poste d'administrateur ou une charge dans une société commerciale, ni être membres actifs d'un syndicat ou d'un organisme professionnel.

Sous sa forme la plus générale, le principe s'énonce comme suit:

> Les titulaires de charges publiques ne doivent pas avoir d'intérêts personnels sur lesquels les activités gouvernementales auxquelles ils participent pourraient avoir un effet quelconque ou important.

2. Transfert facultatif de valeurs économiques d'une source privée à un titulaire de charge publique

Nous avons eu de nombreuses discussions au sujet de l'acceptation de cadeaux, d'argent et d'autres avantages et nous avons constaté, parfois avec consternation, les efforts consacrés ailleurs pour circonscrire les diverses façons possibles de tâcher de corrompre les titulaires de charges publiques et pour s'en prémunir. L'éventail des possibilités n'a de limites que celles de l'imagination: repas et spectacles, cadeaux, voyages, fins de semaine de chasse ou de pêche, conditions de faveur pour un prêt, etc.

L'expression "transfert facultatif de valeurs économiques" englobe ces diverses possibilités. Il s'agit ici du transfert facultatif (par opposition au tranfert non facultatif qui comprend, par exemple, les prestations de retraite et les redevances) de valeurs économiques d'une source privée à un titulaire de charge publique. Sous sa forme la plus outrageante, ce transfert de valeur peut être de la corruption et relever du Code criminel.

Selon Roswell B. Perkins, la corruption est essentiellement un échange: en échange d'une valeur quelconque, le titulaire de charge publique s'engage, expressément ou tacitement, à travailler à réaliser ou à empêcher une mesure gouvernementale

donnée.[1] Les dispositions détaillées du Code criminel sur la corruption constituent un complément essentiel à tout système efficace visant à traiter des problèmes de conflits d'intérêts, bien que le principe étudié ici vise un comportement qui ne va pas jusqu'à la corruption. En fait, le transfert d'une valeur économique à un titulaire de charge publique peut n'impliquer aucune intention criminelle et peut même avoir été occasionné par des motifs les plus louables. Il n'en demeure pas moins que l'acceptation d'un tel transfert de la part d'un titulaire de charge publique peut entraîner chez ce dernier tout un éventail de réactions allant de la gratitude naturelle à la dépendance économique, et risque par la suite de l'empêcher de traiter en toute impartialité, en toute justice et en toute égalité avec le donateur quelle que soit son intention.

Ce transfert facultatif de valeurs économiques d'une source privée à un titulaire de charge publique est le plus souvent désigné dans les lignes directrices actuelles sous le nom de "cadeau". Par exemple, les ministres doivent déclarer dans le Registre public "tous les cadeaux personnels ou autres avantages d'une valeur supérieure à deux cents dollars qu'ils ont reçus de personnes n'ayant aucun lien de filiation, de mariage ou d'adoption, en indiquant le nom et l'adresse du donateur." Les cadeaux officiels et l'hospitalité reçus d'autres gouvernements, de même que l'hospitalité accordée par des amis personnels ne sont pas soumis à cette règle. Tous les cadeaux ou avantages d'une valeur supérieure à deux cents dollars, autres que les cadeaux et avantages officiels, doivent être déclarés, dans les 30 jours qui suivent leur réception, au sous-registraire général adjoint qui en fait rapport dans le Registre public.

Les lignes directrices pour les fonctionnaires ne parlent pas expressément de cadeaux, non plus que les lignes de conduite touchant les personnes nommées par le gouverneur en conseil. Il n'y a aucune disposition à ce sujet dans la Loi sur l'emploi dans la Fonction publique. Cependant, la circulaire du Conseil du Trésor, adressée le 31 décembre 1973 aux sous-ministres et aux chefs des organismes et portant sur les normes de conduite des fonctionnaires, stipule que l'acceptation par des fonctionnaires d'avantages ou de bénéfices isolés ou occasionnels, tels que l'hospitalité ou de petits cadeaux, provenant de personnes qui traitent avec le gouvernement, peut d'ordinaire recevoir le consentement des sous-ministres ou des directeurs "lorsque ces bénéfices ou avantages se font dans les limites de la convenance, qu'ils sont une expression normale de la courtoisie, de politesse en affaires ou en publicité ou qu'ils sont conformes aux normes acceptables de l'hospitalité tout en n'étant pas de nature à faire peser des soupçons sur l'objectivité des fonctionnaires".

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1 Roswell B. Perkins, "The New Federal Conflict of Interest Law", Harvard Law Review, vol. 76, n° 6 (avril 1963), p. 1119.

Cette disposition générale a été développée par la suite, notamment dans une modification au Manuel de gestion du personnel du Conseil du Trésor. Le dernier énoncé de politique émis le 21 novembre 1983, vise à préciser la politique gouvernementale quant à l'acceptation par des fonctionnaires d'avantages, de droits, d'honoraires ou de faveurs offerts par des tiers, particulièrement lorsqu'il s'agit de la gratuité ou de la réduction du prix du transport ainsi que de droits ou d'honoraires pour des discours ou d'autres activités similaires.

Par suite de cette révision de la politique, les règles[2] se lisent maintenant comme suit:

> Les fonctionnaires n'ont pas le droit d'accepter de la part de tiers, soit dans l'exercice de leurs fonctions, soit en leur qualité officielle, des bénéfices, avantages, honoraires ou faveurs qui découlent de leurs activités. Une telle acceptation pourrait compromettre non seulement le poste de l'employé et le ministère, mais aussi constituer, dans certaines circonstances, une infraction au code criminel. Toutefois, les sous-chefs peuvent habituellement consentir à ce que les fonctionnaires acceptent de personnes faisant affaire avec le gouvernement, des faveurs ou des avantages isolés ou occasionnels tels que des marques d'hospitalité ou de petits cadeaux, lorsque ces faveurs ou avantages sont une expression normale de politesse en affaires ou en publicité, ou qu'ils sont conformes aux normes acceptables de l'hospitalité, tout en n'étant pas de nature à faire peser des soupçons sur l'objectivité des fonctionnaires. L'acceptation de tout cadeau devrait se limiter à des articles de promotion peu coûteux, et le degré de l'hospitalité acceptée ne doit pas aller au delà de ce qui est actuellement permis au chapitre de l'hospitalité aux frais de l'État.

Cette politique est ensuite précisée davantage:

> Les employés doivent refuser tout cadeau et toute offre d'hospitalité qui ne sont pas visés ci-dessus. Les cadeaux doivent être renvoyés à leur expéditeur avec une lettre de remerciement expliquant la politique du ministère à cet égard; s'il s'agit de denrées périssables, on peut les envoyer à une oeuvre de bienfaisance et en informer l'expéditeur. Lorsque le ministère paie les frais de voyage d'un employé qui décide, en sa qualité officielle, de prendre la parole à

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2 Selon le volume 1 du Manuel de gestion du personnel, chapitre 3, section 5.5.

la réunion d'un groupe ou d'une organisation (ou d'assurer des fonctions semblables) au cours d'un voyage en service commandé, et que l'employé reçoit de l'organisation ou du groupe concerné une rétribution ou des honoraires pour ces services, il doit en informer le ministère, et renvoyer au groupe ou à l'organisation la rétribution ou les honoraires en question. Toutefois, s'il lui est impossible de les refuser, ou si un tel geste risque d'être interprété comme un manque de courtoisie, l'employé doit rembourser au ministère les frais de voyage que celui-ci lui a payés, ou verser la rétribution ou les honoraires à la Couronne.

Les fonctionnaires doivent également prendre garde de ne pas accepter, pour eux-mêmes ou leur famille, des avantages ou des faveurs, tels des billets de transport ou des possibilités de logement gratuits ou réduits. En outre, l'industrie touristique offre de temps à autre, dans le cadre d'activités de promotion, divers avantages allant des notes de crédit échangeables contre des services dans divers hôtels aux coupons de rabais pour des vols ultérieurs. Comme l'employeur assume les frais de transport et autres liés aux voyages de ses employés en service commandé, les notes et coupons découlant de ces voyages sont la propriété de la Couronne et doivent accompagner la demande de remboursement de frais de voyage de l'employé.

Toutefois, lorsque les fonctions d'un poste exigent explicitement que l'employé voyage à bord d'un véhicule commercial particulier (comme dans le cas des inspecteurs de l'aviation), et que la pratique de l'industrie est de fournir un voyage gratuit à cette fin, l'employé peut accepter ce voyage gratuit, pourvu qu'il en ait été autorisé au préalable par la haute direction de son ministère. En pareils cas, les employés ne doivent pas accepter ni utiliser de laissez-passer qui leur procureraient des avantages personnels. Les ministères doivent plutôt demander aux transporteurs commerciaux de fournir des cartes d'identité qui établissent clairement que le passage vise seulement des besoins d'inspection ou de réglementation.

Ces dispositions doivent s'inscrire dans le contexte de dispositions telles que l'alinéa 110, (1)c) du Code criminel qui interdit à un fonctionnaire ou employé du gouvernement d'exiger, d'accepter ou d'offrir ou de convenir d'accepter d'une personne qui a des relations d'affaires avec le gouvernement une commission, une récompense, un avantage ou un bénéfice de quelque nature, directement ou indirectement, par lui-même ou par l'intermédiaire d'un membre de sa famille ou de toute personne à

son profit, à moins d'avoir obtenu le consentement écrit de son sous-ministre ou du chef de son organisme. Dans ce contexte, le terme "personne" comprend tout particulier, groupe, société ou société de la Couronne.

Sous sa forme la plus abstraite, le principe peut s'énoncer comme suit:

> Les titulaires de charges publiques ne doivent ni accepter ni solliciter de transfert de valeurs économiques de sources privées, même si aucune corruption n'intervient, si le transfert est à la discrétion du donateur et ne résulte pas d'un contrat exécutoire où d'un droit de propriété du titulaire de charge publique.

3. Aide accordée par les titulaires de charges publiques aux personnes physiques et morales dans leurs rapports avec le gouvernement

Les deux types de comportement décrits ci-dessus visent les titulaires de charges publiques dans l'exercice de leurs fonctions officielles, mais il existe un troisième type, différent celui-là, où ceux-ci agissent à titre privé, mais dans une ambiance gouvernemental ou à l'égard d'une affaire impliquant le gouvernement.

Étant donné l'omniprésence des activités gouvernementales, il est concevable, voire probable, que de nombreux titulaires de charges publiques aient un intérêt dans un sujet ou une activité qui n'ait aucun rapport avec leurs fonctions officielles, mais qui concerne néanmoins une dimension ou un aspect du gouvernement dont ils font partie. Il nous semble contraire à l'éthique qu'un titulaire de charge publique se livre à des activités privées en rapport avec des affaires gouvernementales, peu importe laquelle des innombrables fonctions du gouvernement fédéral est mise en cause.

Cela s'applique évidemment aux employés et aux fonctionnaires de la fonction publique, et non aux ministres ou aux secrétaires parlementaires qui, à titre de représentants élus, exercent de telles interventions dans le cadre de leur rôle politique (non plus qu'à certains membres du personnel soustrait d'un ministre qui s'acquittent de cette fonction au nom de leur ministre, ni aux ministres-sénateurs).

Le principe peut s'énoncer comme suit:

> Les titulaires non élus de charges publiques ne doivent pas, sans l'approbation préalable de leur supérieur, outrepasser leurs fonctions officielles pour venir en aide à des personnes, physiques ou morales, dans leurs rapports avec le gouvernement.

4. Aide accordée par les anciens titulaires de charges publiques aux personnes physiques ou morales dans leurs rapports avec le gouvernement.

Ce quatrième comportement est semblable au précédent, sauf qu'il s'agit ici d'anciens titulaires de charges publiques.

La question des activités permises à un titulaire de charge publique qui a quitté le service de l'État à été l'une des plus complexes de notre examen de la politique gouvernementale actuelle. Il est en effet difficile non seulement de définir ce qui est contraire à l'éthique, mais aussi d'appliquer des préceptes généraux à des situations concrètes.

Lorsqu'un titulaire de charge publique quitte le gouvernement, il emporte deux sortes de renseignements: 1) une connaissance générale du fonctionnement, des structures et des personnalités du gouvernement et 2) des renseignements confidentiels précis sur les politiques gouvernementales ou les entités régies par le gouvernement. À notre avis, il est bon que le plus de connaissances possible du premier type soient transmises au secteur privé, de façon à ce que le gouvernement et le secteur privé sachent chacun comment l'un et l'autre fonctionne, et que le secteur privé connaisse la marche à suivre pour traiter avec le gouvernement et les fonctionnaires à consulter à propos d'une affaire donnée.

Le second genre de renseignements, de nature confidentielle ou délicate, risque de perdre assez rapidement son actualité. Toutefois, dans la mesure où de tels renseignements peuvent conférer un avantage injuste à certains intérêts particuliers, nous croyons qu'il n'est pas bon de transmettre de tels renseignements à l'extérieur du gouvernement et que cela est même, à certains égards, contraire à l'éthique. Certes, les titulaires de charges publiques ont prêté serment ou affirmé solennellement de ne pas divulguer les renseignements obtenus dans l'exercice de leurs fonctions, et c'est là un facteur dont il faut tenir compte. En outre, ils ont un devoir de nature fiduciaire envers le gouvernement, découlant de la confiance publique dont ils sont investis par la charge ou le poste qu'ils détiennent dans le secteur public, et l'on peut faire valoir que ce devoir doit être respecté lorsqu'ils ne sont plus titulaires de charges publiques.

Le problème de l'après-mandat est traité en détail au chapitre 14, où figurent aussi nos recommandations à cet égard. Il suffit ici d'énoncer le principe de base :

> Sous réserve de restrictions précises à l'égard de la période écoulée depuis leur départ et de leurs liens avec leurs anciennes tâches, les anciens titulaires de charges publiques devraient pouvoir aider les personnes

physiques ou morales dans leurs rapports avec le gouvernement.

5. Avantages personnels découlant de renseignements obtenus dans l'exercice de fonctions officielles

Passons maintenant à un autre problème, celui de l'utilisation de renseignements gouvernementaux par les titulaires de charges publiques qui sont encore en fonction.

Divers groupements qui s'inquiétaient de l'utilisation "privée" des renseignements gouvernementaux nous ont fait part de leurs vues. Par exemple, des employés du Bureau de la sécurité aérienne du ministère des Transports nous ont parlé du conflit qui se produit lorsque, se prévalant de renseignements obtenus lors d'enquêtes sur les accidents d'avions et d'hélicoptères et sur des aspects connexes de la sécurité aérienne, ils se font engager comme consultants en dehors des heures de travail, ou sont appelés à servir de témoins experts dans des litiges découlant d'accidents aériens. De même, des fonctionnaires du Service météorologique du ministère de l'Environnement nous ont parlé d'employés qui, en dehors des heures de travail, diffusent des bulletins et des analyses météorologiques à la radio ou à la télévision.

Un autre exemple serait celui d'un employé du ministère de l'Agriculture qui utilise les statistiques gouvernementales sur les récoltes, avant leur publication, pour spéculer sur le marché à terme des céréales. Il est possible que cette spéculation ne cause aucun préjudice au gouvernement, ni à aucun individu, mais il s'agit d'un manquement à l'éthique à l'égard du public, en ce sens que l'employé utilise à son avantage personnel des renseignements obtenus dans l'exercice de ses fonctions officielles. Ces renseignements appartiennent au public, et le fonctionnaire ne devrait pouvoir s'en servir pour son usage personnel qu'une fois qu'ils ont été publiés, car alors tous les Canadiens peuvent s'en servir au même titre que lui.

D'après le genre de cas portés à notre attention, il semble que le fait d'énoncer autre chose qu'une règle générale contre le mauvais usage de l'information servirait davantage à créer des problèmes qu'à les résoudre. Nous recommandons plus loin de conserver les codes complémentaires de conduite dans les ministères et les organismes qui en ont déjà, et d'en mettre en place dans ceux qui n'en ont pas. Dans le cadre du principe général que nous exposons ci-dessous, les règles détaillées relatives à l'usage des renseignements publics devrait figurer dans les directives particulières des ministères et organismes.

Toute règle concernant l'utilisation des renseignements gouvernementaux doit tenir compte de deux précautions. Comme l'écrit Roswell Perkins, "à l'égard de l'individu, interdire l'abus de l'information vient dangereusement près d'interdire

l'usage légitime du savoir-faire et de l'expérience acquis dans un emploi gouvernemental." D'autre part, à l'égard de l'intérêt du public, "une telle interdiction n'est pas loin de restreindre la liberté de la presse."[3]

Le principe général en ce domaine peut s'énoncer comme suit:

> Les titulaires de charges publiques ne doivent pas se servir à leur propre avantage de renseignements obtenus dans l'exercice de leurs fonctions officielles tant que ceux-ci ne sont pas accessibles au public en général.

6. Usage privé des biens du gouvernement

La conduite inacceptable que nous venons d'étudier implique l'obtention d'un avantage privé provenant de renseignements acquis dans l'exercice de fonctions officielles, en d'autres termes, un abus de biens intellectuels. Ici, nous étudions l'abus de toutes les autres formes de biens gouvernementaux.

Les gens qui travaillent dans le secteur public disposent de tout un éventail de services et d'installations leur permettant d'exercer correctement leurs fonctions officielles. Les titulaires de charges publiques ont le devoir de protéger et de conserver les biens du gouvernement, notamment l'équipement, les approvisionnements et les autres biens qui leur sont confiés ou fournis.

Les lignes directrices actuelles, sous leurs diverses formes, ne traitent de ces questions que par implication, ce qui rend la tâche difficile lorsqu'il s'agit de résoudre les conflits et d'identifier où se trouve l'intérêt public. Les codes complémentaires de certains ministères en traitent, mais pas tous.

Il n'est pas toujours possible de séparer complètement sa vie personnelle de sa vie publique. Pourtant, une règle claire et simple s'impose en ce domaine, surtout pour que le public sache bien que l'on ne fait pas d'affaires privées aux frais de l'État et pour que les fonctionnaires comprennent mieux certaines zones grises des lignes directrices qui semblent causer des difficultés d'ordre pratique et d'interprétation juridique.

Le principe peut s'énoncer comme suit:

> Les titulaires de charges publiques ne doivent pas utiliser, directement ou indirectement, les biens du gouvernement, quels qu'ils soient, y compris les biens

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3 Perkins, op. cit. p. 1122.

loués au gouvernement, ni en permettre l'usage à des fins autres que des activités officiellement approuvées.

7. Activité politique partisane de la part des titulaires non élus de charges publiques

Toute activité de nature politique qui met en doute le professionnalisme d'un titulaire de charge publique entraîne un conflit d'intérêts. Le conflit n'est pas de nature financière ou matérielle; il s'agit plutôt d'un abus de confiance qui met en question la neutralité politique et l'impartialité de la fonction publique, et qui pourrait empêcher le fonctionnaire d'exercer librement ses fonctions parce qu'aux yeux du public il est de parti pris.

Il est essentiel que les conseils qu'offrent à leurs supérieurs ou à leurs ministres les titulaires de charges publiques soient de la plus grande objectivité possible, sans égard à des considérations partisanes. Les fonctionnaires, leurs supérieurs et leurs ministres doivent être convaincus que ces conseils n'ont pas de motivation politique. Tous les Canadiens doivent être convaincus que les titulaires de charges publiques qui leur fournissent des services sont impartiaux dans l'exercice de leurs fonctions. La simple adoption d'une loi ne saurait garantir cette relation de confiance; c'est par la conduite quotidienne de chacun qu'elle se mérite. Non seulement faut-il être neutre, mais il faut aussi qu'il y ait apparence de neutralité.

Le régime actuel, que nous proposons de maintenir, ne restreint pas l'activité politique des ministres, des secrétaires parlementaires ou du personnel soustrait des ministres; toutefois, il restreint normalement celle des fonctionnaires qui travaillent dans le cabinet des ministres.

La stricte observance de la doctrine traditionnelle de la neutralité politique dans un régime parlementaire comporte certaines exigences:

- la politique doit être séparée de l'administration;
- les fonctionnaires doivent être nommés et promus au mérite et non pour des motifs partisans;
- les fonctionnaires ne doivent pas se livrer à des activités politiques partisanes;
- les fonctionnaires ne doivent pas exprimer publiquement leurs opinions personnelles sur les politiques ou l'administration du gouvernement;

- les fonctionnaires doivent fournir aux politiciens dont ils relèvent des conseils directs et objectifs, en privé et en secret; les politiciens doivent respecter cet anonymat;

- les fonctionnaires doivent exécuter les décisions fidèlement et loyalement, sans égard à la philosophie et aux programmes du gouvernement au pouvoir, peu importe leurs opinions personnelles.

Le professeur Kenneth Kernaghan souligne que certaines des conditions préalables n'ont jamais été réalisées et que d'autres ont été modifiées en raison de l'évolution politique, sociale et technologique.[4] Il est vrai que les politiciens de même que les fonctionnaires participent activement à l'élaboration de politiques, de sorte que la frontière entre la politique et l'administration s'estompe de plus en plus.

Certaines nominations, bien entendu, ne sont pas du ressort de la Commission de la Fonction publique, par exemple celles des sous-ministres, de certains sous-ministres adjoints, des chefs et de certains membres des organismes, agences et commissions, des ambassadeurs et du personnel soustrait des ministres. C'est le gouvernement qui a le pouvoir de faire ces nominations, pour les motifs appropriés et conformément aux lois. Kernaghan souligne qu'il est difficile de mesurer avec précision les répercussions de ces nominations sur la neutralité politique. À son avis, la nomination de ces personnes à des charges publiques sans concours et pour des motifs partisans viole le principe du mérite, mais non le système du mérite.[5]

Il existe des arguments en faveur des restrictions et d'autres contre celles-ci. D'une part, on peut faire valoir qu'il faut protéger et maintenir l'impartialité politique de la fonction publique, et que la participation des fonctionnaires à des activités politiques aurait au moins pour effet de miner la confiance du public en cette impartialité: les fonctionnaires pourraient donner priorité à leur loyauté envers un parti politique, aux dépens de leur loyauté envers leur ministre et le gouvernement, se trouver en situation de conflit d'intérêts entre les objectifs du gouvernement et ceux de leur parti politique, ou vouloir influencer indûment des décisions à des fins de patronage politique, par exemple dans les questions d'emploi ou d'adjudication de contrats. Enfin, d'aucuns croient que le fait d'imposer des restrictions à l'activité partisane des fonctionnaires peut créer un climat favorable à une attitude professionnelle de neutralité et d'impartialité.

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4 Kernaghan, Kenneth, "Politics, Policy and Public Servants; Political Neutrality Revisited", L'administration publique canadienne, vol. 19, n° 3, 1976, p. 433.

5 Ibid., p. 445.

D'autre part, on pourrait faire remarquer que la neutralité et l'impartialité politiques de la fonction publique n'ont jamais empêché les gouvernements d'utiliser les rouages administratifs à des fins partisanes, pas plus qu'elles n'ont empêché les fonctionnaires d'aspirer à des charges politiques ou d'avoir des opinions politiques personnelles. Ces deux états de fait pourraient mener à l'érosion de la neutralité et de l'impartialité politiques de la fonction publique, même si bon nombre de fonctionnaires canadiens, il est vrai, se sont lancés en politique et y ont réussi dans le passé, notamment l'un des membres de notre Groupe de travail.

Un certain nombre de considérations, à notre avis déterminantes, favorisent la neutralité politique de la fonction publique. Il est de l'intérêt des ministres et des parlementaires que les fonctionnaires ne se servent pas de leur poste pour promouvoir leur propre philosophie politique. En outre, les ministres doivent être assurés que les conseils qu'ils reçoivent ne sont pas motivés par des considérations partisanes ou politiques et que leurs représentants agissent de bonne foi dans l'exécution des décisions et l'administration des politiques. La fonction publique elle-même, qui doit servir des gouvernements de diverses orientations politiques, est aussi intéressée à cette neutralité - elle doit être perçue comme le serviteur impartial du gouvernement au pouvoir, quel qu'il soit. Quant aux fonctionnaires eux-mêmes, ils sont manifestement intéressés, au même titre, au maintien de la neutralité de l'ensemble de la fonction publique, mais ils désirent également exercer les droits démocratiques fondamentaux que possèdent les citoyens canadiens à l'égard de l'activité politique. Finalement, les intérêts du public sont variés. Les citoyens doivent être assurés que l'allégeance politique n'entre pas en ligne de compte lorsqu'ils traitent avec les ministères et organismes du gouvernement. Tout comme les fonctionnaires, ils s'attendent à ce que l'avancement dans la fonction publique se fasse en fonction du mérite plutôt que pour des raisons partisanes.

Ces considérations s'appliquent non seulement aux fonctionnaires, mais aussi aux employés des sociétés de la Couronne et des organismes, ainsi qu'aux membres des Forces armées et de la Gendarmerie royale du Canada.

La doctrine et la pratique traditionnelles de la neutralité politique ont été modifiées par l'élargissement des limites permises de l'activité politique, mais jusqu'ici, l'effet n'a été ni rapide ni révolutionnaire. Il reste par ailleurs à préciser les droits permis et à évaluer tous les effets de la Charte canadienne des droits et libertés.

Bien que la tradition de l'anonymat soit demeurée très vivace chez les titulaires non élus de charges publiques, leur

visibilité s'est accrue suite aux modifications apportées aux institutions et aux pratiques politiques, à l'adoption de la législation sur l'accès à l'information et aux demandes croissantes d'information de la part des médias. Tout porte à croire que cette baisse de l'anonymat officiel se maintiendra.

Dans une société démocratique, il est souhaitable que tous les citoyens aient leur mot à dire dans les affaires de l'État et que le plus grand nombre possible joue un rôle actif dans la vie publique. Pourtant, le bien public exige que l'on maintienne l'impartialité politique de la fonction publique, et la confiance en cette impartialité constitue une partie essentielle de la structure du gouvernement dans notre pays.

Le principe de la neutralité politique peut s'exprimer comme suit:

> Les titulaires non élus de charges publiques ne doivent pas se livrer à des activités politiques partisanes qui puissent mettre en danger la neutralité politique, réelle et apparente, de la fonction publique.

8. Critique des politiques gouvernementales

Étroitement reliée à la question de l'activité politique partisane est le fait suivant: "Conformément à la tradition bien établie, les fonctionnaires n'expriment pas en public leur opinion personnelle sur les questions faisant l'objet de controverse à caractère politique ou sur des politiques ou programmes gouvernementaux existants ou envisagés."[6]

Cette tradition, comme celle de la neutralité politique de la fonction publique, est battue en brèche de divers côtés et pour plusieurs raisons. Les employés du gouvernement doivent de plus en plus souvent fournir des renseignements sur les programmes et jouer un rôle de conciliation. On dit souvent que le Canada est une "société de l'information" et qu'il faut un public bien informé; les employés du gouvernement doivent donc être en mesure de diffuser des renseignements sur les politiques et le fonctionnement du gouvernement chaque fois que la chose est possible. En outre, à mesure que de nouvelles fonctions se créent au gouvernement pour assumer les tâches traditionnellement dévolues aux représentants élus - par exemple rencontrer les groupes de pression et les représentants communautaires pour entendre leurs griefs et élaborer des solutions aux problèmes - un certain nombre de hauts fonctionnaires en sont venus à travailler d'une façon qui rend les "commentaires publics" presque inévitables. Le fait que la presse s'intéresse davantage aux

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6 Kenneth Kernaghan, Comportement professionnel: directives à l'intention des fonctionnaires, op. cit., p. 38.

opinions de certains fonctionnaires est un autre élément de cette équation.

Il faut certainement que les titulaires de charges publiques soient informés des commentaires publics qu'ils peuvent faire, des méthodes à suivre dans les contacts avec le public et la presse et des moyens de résoudre l'incertitude quant aux genres de commentaires qui sont permis. Par exemple, il ne s'agit pas de limiter les droits d'aucun fonctionnaire à l'égard des questions qui font légalement l'objet de la négociation collective en vertu de la Loi sur les relations de travail dans la Fonction publique. Nous croyons qu'il est possible d'atteindre cet objectif au moyen d'une règle sur les commentaires publics qui ferait partie d'un code d'éthique. Cette question sera examinée en détail plus loin. Il suffit pour l'instant de s'en tenir au principe de base suivant:

> Les titulaires de charges publiques ne doivent pas exprimer publiquement leur opinion personnelle sur des questions qui font l'objet d'une controverse politique ni sur les politiques ou l'administration du gouvernement si cela risque de diminuer la confiance du public à l'égard de la façon dont ils s'acquittent ou s'acquitteront de leurs fonctions ou si cela risque de nuire aux relations avec d'autres gouvernements.

Cette règle n'interdit pas aux fonctionnaires d'exercer les droits que leur confère la Loi sur les relations de travail dans la Fonction publique.

9. Conduite indigne dans un poste public

La conduite personnelle des titulaires de charges publiques peut avoir des répercussions importantes sur leur capacité d'exercer convenablement leurs fonctions et sur la façon dont le public perçoit le gouvernement.

Notre mandat comprend l'étude des politiques qui devraient régir la conduite des titulaires de charges publiques. Nous n'avons pas l'intention d'interpréter ce mandat assez largement pour nous attarder au comportement personnel de ceux qui sont au service de l'État. Nous avons cependant constaté, dans notre étude des lignes directrices actuelles, particulièrement les codes complémentaires de conduite et les divers projets de code présentement en rédaction, que l'on parle de plus en plus, à l'égard des questions de conflits d'intérêts, dans leur interprétation traditionnelle, de sujets comme le harcèlement (sexuel ou autre) du personnel au travail.

La discrimination indue est un aspect important de la conduite personnelle qui ne conviendrait manifestement pas à ceux qui sont au service du gouvernement. La loi interdit déjà la

discrimination fondée sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, la situation de famille, l'invalidité ou l'état de personne graciée. Cela concerne, par exemple, la façon dont les fonctionnaires et les employés du gouvernement traitent le public.

En outre, tous les employés et fonctionnaires de la fonction publique du Canada ont eux-mêmes le droit d'être traités justement au travail et d'oeuvrer dans un milieu libre de discrimination, de harcèlement personnel et de harcèlement sexuel. On ne saurait tolérer un comportement qui prive des individus de leur dignité et du respect qui leur est dû, non plus que le fait de se servir de son autorité ou de sa position pour intimider, forcer ou harceler d'autres personnes. Cela s'applique à la fois aux autres fonctionnaires et aux membres du public avec qui traitent les fonctionnaires.

Le "harcèlement personnel", comprend tout comportement à l'égard d'un employé qui est choquant, met en danger son emploi, nuit à l'exécution de ses fonctions ou menace son gagne-pain. Le "harcèlement sexuel" comprend des commentaires, des gestes ou des contacts physiques de nature sexuelle qui peuvent être inacceptables ou choquants, que cela se produise une seule fois ou qu'il s'agisse d'une série d'incidents, même mineurs. En général, le harcèlement sexuel est un comportement de nature sexuelle qui est délibéré et non sollicité. Il est coercitif et unilatéral; tant les hommes que les femmes peuvent en être victimes.

C'est un abus d'autorité pour un employé que de se servir de son autorité et de son poste, avec le pouvoir implicite de miner, de saboter ou d'influencer la carrière d'un autre fonctionnaire ou d'y nuire, ou de nuire à la prestation de biens et de services au public. Ces abus de pouvoir consistent en des pratiques aussi flagrantes que l'intimidation, la menace, le chantage et la coercition, et comprennent également le fait de favoriser un employé aux dépens d'un autre; ils peuvent s'appliquer à l'affectation des tâches, aux occasions de formation ou de promotion, à l'évaluation du rendement ou à la rédaction de lettres de référence.

Les employés du secteur public devraient naturellement tenir compte de l'image de marque de leur ministère ou organisme. Ceux qui sont au service de l'État doivent faire preuve d'un esprit professionnel dans leurs rapports avec d'autres, de façon à ne pas jeter le discrédit sur le gouvernement.

Le principe peut s'énoncer comme suit:

> Les titulaires de charges publiques ne doivent pas, par leur conduite personnelle, exploiter l'autorité de leurs fonctions à des fins privées ou pour leur propre satisfaction, ni jeter le discrédit sur le caractère professionnel de la fonction publique.

CHAPITRE 4

QUI EST RESPONSABLE DE L'ÉTHIQUE DANS LE SECTEUR PUBLIC?

Le maintien des normes d'éthique est l'affaire de tous. Nous avons d'ailleurs réparti ces divers responsables en huit principaux groupes de responsabilité et nous les avons examinés séparément.

1. Responsabilité de l'individu

Selon toutes les lignes directrices qui régissent actuellement les conflits d'intérêts, la responsabilité première de veiller à ne pas se trouver en situation réelle, apparente ou potentielle , de conflit d'intérêts incombe à chaque individu, et si, malgré tout, cela se produit, il lui appartient encore de faire en sorte que cette difficulté soit réglée de façon satisfaisante. Nous recommandons que le principe de la responsabilité individuelle soit retenu, et ce pour au moins deux raisons.

D'abord, le principe voulant que l'individu soit responsable de ses actions personnelles s'inscrit carrément au coeur de notre philosophie judéo-chrétienne. Il est si important dans notre société qu'il doit être sous-jacent à tout système de règles touchant l'éthique au sein du gouvernement. Il rejette toute excuse du genre "Je n'ai fait qu'obéir aux ordres" ou "J'ai fait comme tout le monde". Il a peut-être trouvé son expression la plus poignante dans le procès de Nuremberg, en 1945, au cours duquel des hauts dirigeants nazis furent traduits en justice et condamnés comme criminels de guerre. On réitéra alors le principe que nul ne peut transférer à la collectivité ou à quelque organisme autonome la responsabilité de ses propres actes criminels ou immoraux. Un système qui tient l'individu responsable de ses propres actions maintient le point d'appui avec la réalité.

Un second motif qui justifie d'intégrer la notion de responsabilité individuelle à tout système de règles d'éthique dans la fonction publique a trait aux relations de travail employeur-employé. Lorsqu'il est bien clair que l'employé est personnellement tenu de faire en sorte que sa conduite respecte l'éthique stipulée dans le cadre des règles précises énoncées, tout écart par rapport aux dites règles justifie le recours aux mesures disciplinaires. Sans ce lien entre la responsabilité individuelle et le respect des règles de conduite, la direction

n'aurait pas d'assises légales suffisantes pour exiger qu'un intéressé lui rende compte.

2. Responsabilité de la direction

La direction détient aussi une part de responsabilité dans toutes les questions de conflits d'intérêts. Cette responsabilité pour les gestionnaires du gouvernement consiste à veiller à la mise en place de mécanismes permettant de faire face aux problèmes de conflits d'intérêts, et de bien faire connaître et comprendre aux fonctionnaires les moyens mis à leur disposition pour obtenir des conseils et de décisions afin de résoudre tout conflit. Cette responsabilité est donc double: d'une part, la direction doit élaborer des procédures efficaces et d'autre part elle doit les diffuser d'une façon telle que chaque intéressé sache où s'adresser pour obtenir au besoin des conseils ou afin de divulguer à son supérieur une possibilité de conflit.

3. Responsabilité du Premier ministre

Le Premier ministre détient une large part de responsabilité en ce qui concerne les questions d'éthique dans le secteur public.

D'abord, c'est le Premier ministre qui donne le ton à l'ensemble du gouvernement. Sa conduite et celle qu'il exige des autres sont une indication claire pour tous les membres de la fonction publique et pour tous les citoyens en général des normes qui sont appliquées. Ce fait, quoique reconnu d'emblée, nous est apparu encore plus important lorsque nous avons constaté à quel point l'augmentation du nombre de fonctionnaires et l'accroissement du champ et de la portée de l'activité économique du gouvernement avaient modifé la nature du gouvernement même et changé le cadre dans lequel les fonctionnaires évoluent.

En examinant la situation ailleurs, aux États-Unis par exemple, au niveau fédéral, nous avons constaté que les difficultés surgissent lorsque la responsabilité en matière d'éthique tend à incomber aux cadres intermédiaires. Comme les cadres supérieurs semblent s'occuper davantage des politiques et de l'administration générale, on en conclut que les questions d'éthique sont considérées comme secondaires. C'est pourquoi il est important dans le système américain, nous a-t-on fait remarquer, que le Président accorde une grande priorité aux questions d'éthique, et le déclare publiquement. Quant au secteur privé au Canada, il a été souligné que le premier dirigeant d'une entreprise doit clairement prouver à tous les employés que le respect du code d'éthique est une chose essentielle. Bref, le message doit venir des plus hautes instances et être bien clair.

Ensuite, le Premier ministre est responsable, directement et indirectement, de la plupart des nominations aux

postes les plus élevés du gouvernement, dont celles des ministres du Cabinet, des secrétaires parlementaires et des sous-ministres et d'autres personnes nommées par décret. Lorsqu'il procède à ces nominations ou demande la démission des personnes qui, selon lui, ne devraient plus occuper leur charge, il tient compte d'un certain nombre de facteurs, dont l'un est certainement la probité des personnes en cause. Le Premier ministre a la prérogative d'édicter des règles dans ce domaine, et c'est d'ailleurs ce qui a permis l'établissement des lignes directrices actuelles, qui sont contenues dans les décrets.

4. Responsabilité des tribunaux et des organismes chargés de faire observer la loi

Certains des plus graves problèmes de conflits d'intérêts sont visés par les dispositions du Code criminel. Au Canada, les agents de police et autres personnes responsables de l'application de la loi sont chargés de faire enquête sur les allégations de conduite illégale, et de porter des accusations s'il y a lieu. Il peut être difficile parfois de distinguer entre une infraction aux règles concernant les conflits d'intérêts et une violation du Code criminel. Durant notre étude, la conséquence d'une enquête, menée par la GRC et des fonctionnaires du ministère sur des activités prétendues illégales ou contraires à l'éthique qu'auraient exercées certains membres des services de traduction du gouvernement fédéral a nécessité des poursuites criminelles par la police contre certaines personnes et la prise de mesures disciplinaires par la direction contre d'autres.

Dans les affaires dont ils sont saisis mettant en cause la question d'éthique, les tribunaux doivent, évidemment, interpréter les faits et appliquer la loi en toute justice. Néanmoins, les poursuites devant les tribunaux peuvent révéler à la société canadienne d'importants messages généraux sur la manière dont les manquements à l'éthique et la conduite illégale sont traités. On peut dire que les tribunaux, outre le devoir qu'ils ont de régler les cas précis dont ils sont saisis, ont la responsabilité de s'adresser au grand public.

5. Responsabilité du Parlement

Tous les principes et règles de procédure actuels concernant les conflits d'intérêts ne sont pas entérinés par décret. Un certain nombre des dispositions en cette matière sont inscrites dans les lois du Parlement. Le Parlement est donc tenu, en sa qualité de législateur, de veiller à ce que toutes les dispositions qui traitent de questions d'éthique et de conflits d'intérêts soient intelligemment formulées et bien énoncées. Sous cet aspect, plusieurs cas de libellé exceptionnel sont dignes de mention, par exemple celui du paragraphe 3.(5) de la Loi sur l'Office national de l'énergie, qui interdit aux membres de l'Office de détenir des intérêts financiers dans des sociétés

oeuvrant dans le domaine de l'énergie. Le paragraphe, qui ne comprend qu'une phrase, contient plusieurs éléments, mais il est précis. Il serait bon que les parrains d'autres mesures législatives dans ce domaine se rappellent que l'énoncé d'une règle d'éthique doit être simple, concis et complet.

La responsabilité du Parlement ne se limite pas à l'adoption de lois. Certains comités parlementaires ont compétence sur des domaines ou sujets qui peuvent donner lieu à des problèmes d'éthique. Le Parlement a donc une responsabilité de "chien de garde", celle de veiller à ce que s'il y a lieu, ces problèmes soient discutés avec sérieux et à-propos.

Le Parlement est une tribune où les intérêts se font concurrence et entrent en conflit et où certaines mesures législatives règlent la façon dont les parlementaires peuvent, dans le cadre du processus législatif, s'engager ou encore faire des représentations au nom de certains groupes. Certains articles de la Loi sur le Sénat et la Chambre des communes régissent ce domaine d'activité et sont renforcés par plusieurs autres, tels ceux du Code criminel, de la Loi électorale du Canada et du Règlement de la Chambre.

Une autre responsabilité qui incombe aux parlementaires est celle de donner l'exemple. En effet, vu qu'ils jouissent d'une visibilité marquable, l'éthique de leurs actions et de leur conduite démontre aux fonctionnaires et à l'ensemble des citoyens la façon acceptable de se comporter.

6. Responsabilité des partis politiques

Les partis politiques supportent mal les scandales impliquant leurs membres et de ce fait ils sont interessés à assurer un niveau convenable de conduite. Cet intérêt, dans une certaine mesure, démontre une part de responsabilité. L'appareil d'un parti est en constante évolution, et son nom et sa réputation reposent sur la bienveillance des gens dans le temps. Toute activité malhonnête ou tout manquement à l'éthique de la part de l'un ou l'autre de ses membres, qu'il soit élu ou, dans certains cas, nommé à une charge publique, constitue une raison suffisante pour prendre les mesures disciplinaires ou les sanctions qui s'imposent. Bien qu'il soit rare au Canada qu'un parti politique renvoie un de ses membres à grand bruit, il peut néanmoins être plié à la discipline du parti de diverses façons.

En outre, les partis politiques se doivent de prévoir dans leurs politiques ou leurs programmes des mesures particulières visant l'éthique dans le secteur public. C'est loin d'être une question purement académique, car elle fait surface à l'occasion dans la vie publique canadienne, et les porte-parole des partis politiques ont le devoir de l'aborder. Nous souhaitons qu'ils se penchent sur notre rapport et adoptent une politique qui tienne compte de ses recommandations.

7. Responsabilité des médias

Les médias ont aussi un rôle important à jouer en la matière, d'une part parce qu'ils doivent porter les problèmes de conflits d'intérêts à l'attention de la population lorsqu'ils sont mis à jour, et d'autre part parce qu'ils doivent le faire de façon respnsable. On ne répétera jamais assez l'importance du rôle des médias de sensibiliser le public à toutes questions de conduite repréhensible; en termes politiques et pratiques, si les médias ne portaient pas ces cas devant le tribunal de l'opinion publique, les transgressions ne seraient peut-être pas condamnées comme il convient.

Nous avons dit plus tôt que l'adage "Ne faites jamais rien qui puisse vous embarrasser si jamais on l'apprend est une règle empirique facile à suivre lorsque vient le temps de décider si une action pourrait constituer un manquement à l'éthique. D'un autre point de vue, sans les médias, il manquerait ce lien essentiel entre l'individu et l'opinion publique qui influe beaucoup sur les manières d'agir de l'individu.

Comme l'a fait remarquer Michael J. Smither, les médias ont de tout temps assumé le rôle du chien de garde public qui surveille le processus politique[1]. S'ils s'en acquittent bien, ils peuvent contribuer à faire respecter les objectifs d'intérêt public. Selon lui, on ne saurait trop insister sur la nécessité pour les médias de s'attacher à la véracité de leurs commentaires lorsque'ils traitent de question de conflits d'intérêts et de bien comprendre la législation. Ces conditions sont impératives. Toute inexactitude en rapportant les faits peut avoir de vastes répercussions sur le journaliste d'une part, sur les personnes touchées ensuite, et enfin, sur le public que tous deux souhaitent servir.

Il suggère que tout manquement de la part d'un journaliste entraîne de multiples conséquences: la population peut être mal informée, l'esprit de la loi ou des règles régissant l'éthique peut être neutralisé, le membre ou futur membre du Parlement peut subir un préjudice financier ou autre dans sa vie politique ou sociale ou sur le plan des affaires; enfin, le journaliste et son journal peuvent être poursuivis pour diffamation. Par contre, sans son intervention, les transgressions risquent de ne pas être mises à découvert, ce qui ne peut qu'encourager les coupables.

Par ailleurs, le journaliste compétent sait que la recherche de la vérité dans le domaine de l'éthique débute par la

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1. Michael J. Smither, Municipal Conflict of Interest, St. Thomas, Ontario, Municipal World Inc., 1983, p. 123.

connaissance des objectifs des lois et règles applicables, et des devoirs que celles-ci imposent aux représentants publics qui y sont assujettis.

8. Responsabilité des éducateurs

Ceux qui nous éduquent et nous enseignent, parents et autres membres de la famille, membres du clergé, professeurs, juges ou supérieurs au travail, ont de toute évidence la responsabilité de transmettre de génération en génération une saine valorisation de l'éthique.

Le code d'éthique que nous proposons serait dénué de sens s'il ne s'appuyait pas sur la conscience publique et le sentiment de l'importance de l'honnêteté et de l'éthique dans le comportement. Dans ce contexte, nous recommandons que le conseiller en éthique détienne le mandat d'éduquer, d'informer et d'instruire les personnes assujetties aux règles d'éthique, les autorités responsables de leur administration et de leur gestion au sein du gouvernement, et toutes les personnes intéressées par cette question.

CHAPITRE 5

FORMULES POSSIBLES: RÈGLES TACITES, CODES D'ÉTHIQUE, LIGNES DIRECTRICES, RÉGIMES LÉGISLATIFS, COMMISSIONS D'ÉTHIQUE

Il y a diverses façons d'aborder les situations de conflits d'intérêts; le présent chapitre en donne un aperçu général.

a) Règles tacites

La méthode qui a été traditionnellement la plus répandue au Canada et qui s'applique toujours dans un certain nombre de provinces, est celle qui, n'ayant aucune règle écrite, s'appuie sur le sens moral - plutôt que sur les mots consignés - comme guide quant à ce que l'on peut faire et ce que l'on ne peut pas faire lorsque des intérêts privés et publics viennent en conflit.

Comme nous l'avons déjà dit, lorsque nous sommes entrés tous deux au Cabinet, seules des règles tacites régissaient la conduite des ministres et les conflits d'intérêts. Il en allait en général de même dans l'ensemble de la fonction publique.

Dans le cadre de notre étude, nous avons parlé à un certain nombre de hauts fonctionnaires et d'anciens fonctionnaires, dont bon nombre se rappelaient l'époque des règles tacites. Pour citer un ancien sous-ministre: "Nous savions tous ce que nous pouvions et ce que nous ne pouvions pas faire. D'ailleurs, nous étions si peu nombreux que nous pouvions tous nous surveiller." Ce dernier, de même que plusieurs autres, éprouvait une certaine nostalgie pour cette époque où l'on abordait plus simplement les questions d'éthique. Il regrettait l'époque où un comportement conforme à l'éthique était présumé être la norme et où il semblait inutile de rédiger des règles, puisque l'intégrité et la réputation de chacun, aidées peut-être par l'oeil critique des collègues, devaient suffire à préciser les limites à ne pas dépasser.

Pourtant, tous étaient unanimes à reconnaître qu'il était impossible de revenir aux règles tacites, l'augmentation du nombre des fonctionnaires et l'importance accrue du gouvernement dans l'économie ayant modifié de façon fondamentale la nature du gouvernement et le milieu de travail où les tâches s'accomplissent. Des codes écrits de façon précise peuvent donc constituer de nos jours un guide aussi utile que les règles

tacites d'autrefois. Comme le concluait un comité de hauts fonctionnaires britanniques en 1972 dans son rapport sur les normes professionnelles dans la fonction publique: "L'existence d'un code complet intangible et tacite serait difficile à démontrer et à irait l'encontre de l'expérience de beaucoup de gens. Nous croyons que compter sur un tel code peut constituer une attitude dangereuse.[1]

b) Codes d'éthique

Personne ne prétend que l'existence d'un code d'éthique soit en elle-même un remède simple et suffisant aux problèmes d'éthique dans le secteur public. La valeur d'un code d'éthique, selon le professeur Kernaghan, dépend dans une certaine mesure qu'il soit écrit ou tacite, de son acceptation par le public et les fonctionnaires ainsi que de sa forme, de son contenu et de et de son administration."[2] À propos du bien-fondé des codes écrits, il ajoute que les fonctionnaires, à titre de citoyens, adoptent naturellement les pratiques et les normes en matière d'éthique qui sont acceptées par la société, et sont enclins à les manifester dans leur conduite au travail comme ailleurs. Un code d'éthique écrit en bonne et due forme assure aux employés un point de référence leur permettant d'évaluer leur propre conduite aussi bien que celle des autres. Il stipule les comportements prohibés et peut indiquer les sanctions qu'entraîne toute infraction aux principes.

Une fois qu'un code existe, les employés ont tendance à s'en servir comme forme d'autodiscipline; ils en viennent à savoir instinctivement comment ils doivent se comporter. Les cadres supérieurs ont le rôle capital de tenir les employés au courant de ce que l'on attend d'eux et de donner l'exemple. Parallèlement, les aspirations des pairs à cet égard peuvent aussi avoir une influence positive sur les employés. Les groupes d'employés pourront élever et maintenir les normes d'éthique à un niveau plus haut s'il existe un code écrit.

Naturellement, il y aura toujours des employés dont le comportement ne sera pas touché par la mise en place d'un code d'éthique. C'est pour ce groupe que le code écrit peut servir de contrôle administratif, surtout s'il comporte des sanctions précises. La direction utilisera alors le code pour jauger la mesure dans laquelle un comportement donné n'est pas acceptable ainsi que la gravité de certaines entorses au code.

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1 Professional Standards in the Public Service, a Report by a Sub-Committee of the First Division Association, Public Administration (U.K.), 50 (été 1972), p. 169.

2 Kernaghan, Ethical Conduct, op. cit., p. 5.

Malgré cela, il y a des arguments de poids en faveur d'un code tacite. On fait valoir, d'abord, que les employés ont un meilleur comportement s'ils se fondent sur la coutume et des règles officieuses. En second lieu, tout porte à croire qu'un code écrit ne saurait mentionner tous les manquements à l'éthique. En troisième lieu, il peut être difficile de faire le consensus sur ce qui est jugé acceptable ou non.

c) Lignes directrices

Les règles actuelles sur les conflits d'intérêts au palier fédéral se trouvent pour la plupart dans des "lignes directrices" qui ont dans une large mesure un caractère d'incitation.

La diversité des interprétations données par différents individus quant au sens et à la portée juridique des "lignes directrices" est assez inquiétante. Pour certains, elles ont valeur de loi. Pour d'autres, il s'agit uniquement de conseils et de suggestions utiles quant à la voie à suivre dans telle ou telle circonstance. Pour ces derniers, ce n'est certainement pas catastrophique de ne pas s'y conformer; pour les premiers, une infraction aux lignes directrices équivaut à une infraction à n'importe quelle autre loi.

Nous notons que l'interprétation large du concept de "lignes directrices" vient peut-être plus facilement à ceux qui pensent en anglais plutôt qu'en français, puisque le terme français "lignes directrices" implique une notion de dirigisme absente dans l'expression anglaise "guidelines".

Le droit administratif reconnaît dans les procédures statutaires une distinction claire entre les directives et les exigences obligatoires; les dernières doivent être respectées intégralement, alors qu'il suffit d'observer la substance des premières. Il attribue en outre une portée juridique particulière aux lignes directrices, politiques, guides, manuels et autres documents semblables qui n'ont pas force de loi; ils devraient être suivis par choix et non par nécessité. Par ailleurs, ils ne peuvent être appliqués comme s'ils avaient force de loi.

Les lignes directrices actuelles présentent un problème particulier du fait qu'elles combinent à la fois des principes généraux et des questions de procédure, alors qu'à notre avis ces deux aspects devraient être séparés. Il y a eu plusieurs tentatives de détacher les principes fondamentaux des questions de procédure, en les isolant dans le texte et en reportant les dispositions en annexe. Jusqu'à présent, pourtant, à notre avis, cette séparation n'est pas suffisante puisque les principes et les procédures s'entremêlent souvent.

À cause des interprétations diverses du sens de l'expression "lignes directrices" et parce que cette expression a servi pendant assez longtemps à désigner des règles applicables au secteur public fédéral que l'ambiguïté ou l'incertitude à son égard sont maintenant largement établies, il est recommandé d'abandonner cette expression.

d) Régimes législatifs

Aux États-Unis, on aborde d'ordinaire les problèmes d'éthique en adoptant une loi puis en mettant sur pied une commission indépendante d'éthique ou un organisme similaire pour assurer l'observation des règles énoncées dans la loi.

Un régime législatif présente des avantages semblables à ceux des codes d'éthique écrits, dont nous avons déjà parlé; les personnes visées sont certaines des règles, puisque celles-ci ont été consignées par écrit, et ces dispositions écrites sont également utiles comme instrument d'administration publique. La forme législative, comme aux États-Unis, offre d'autres avantages. Les règles ont force de loi, elles s'accompagnent des procédures judiciaires normales, les sanctions sont clairement énoncées et elles constituent un point de référence pour ceux qui désirent une interprétation juridique de leurs droits et de leurs obligations.

Pour certains, cette façon de faire a le désavantage de rendre les procédures relatives à l'éthique trop légalistes, et ils favorisent une démarche purement administrative, aidée de certains pouvoirs discrétionnaires et comportant une plus grande latitude d'interprétation.

L'adoption d'une loi à l'égard de l'éthique représente, dans la plupart des cas, une tentative de régler le problème d'une façon générique et globale. Cette méthodee américaine diffère nettement de la pratique habituelle en Grande-Bretagne et au Canada. Dans cette tradition, on réagit aux divers problèmes au fur et à mesure qu'ils se présentent en élaborant des politiques ou des règles, lesquelles, par ailleurs, relèvent davantage de l'administration publique que de l'application de la loi.

Plusieurs juridictions canadiennes ont adopté l'approche législative. Au Nouveau-Brunswick, par exemple, les dispositions sur les conflits d'intérêts applicables aux ministres, aux sous-ministres, aux juges, au personnel des ministres et aux députés figurent à la Loi de 1978 sur les conflits d'intérêts. Les dispositions relatives aux membres des législatures de tous les paliers au Canada (fédéral, provincial et territorial) sont exprimées sous forme législative, par exemple dans la Loi sur le Sénat et la Chambre des communes, de même que dans des lois et ordonnances des diverses assemblées législatives du pays. Au palier municipal, cette voie a aussi été choisie dans plusieurs

cas; la Loi ontarienne sur les conflits d'intérêts au palier municipal (Municipal Conflict of Interest Act) qui s'applique à tous les conseils municipaux de la province, en est un exemple. La plupart de ces textes législatifs visent des représentants élus.

Dans le cas des titulaires de charges publiques, on a en général évité au Canada d'adopter une loi unique et globale régissant l'éthique. Il ne faudrait cependant pas croire qu'aucune mesure legislative n'a été prise dans ce domaine, puisque les dispositions des diverses lois traitent de questions particulières aux conflits d'intérêts. Ces dispositions éparses caractérisent bien l'approche gradualiste.

Dans les juridictions qui ont adopté un régime législatif concernant l'éthique, par exemple au palier fédéral aux États-Unis avec le "Ethics in Government Act", on a vu naître par la suite un ensemble assez considérable de jurisprudence, d'avis motivés et de bulletins d'interprétation destinés à aider à appliquer la loi à des cas particuliers. Déjà deux publications américaines traitent exclusivement de cette multitude de règles: le Federal Ethics Handbook, guide juridique annoté, et le Ethics in Government Reporter, répertoire de lois et d'ordonnances, de règlements fédéraux, de décisions judiciaires, d'opinions du Bureau de l'éthique gouvernementale, de règlements des organismes, de commentaires sur la responsabilité juridique professionnelle et de formulaires.

Nous ne croyons pas qu'il soit nécessaire de noircir autant de pages pour préciser et interpréter une éthique acceptable pour le secteur public. Nous doutons fort que l'expérience canadienne soit en fait parallèle à celle des États-Unis, pays qui compte les deux tiers de l'ensemble des avocats du monde, qui adopte une approche plutôt contentieuse et se préoccupe davantage des règles fondamentales de procédure judiciaire, ce qui aboutit à des opérations telles que si elles étaient transposées dans le contexte canadien, elles seraient à notre avis d'une envergure inacceptable. La rigueur et l'efficacité des règles d'éthique ne dépendent pas à notre avis de la taille des organismes mis sur pied pour les administrer, mais de plusieurs autres facteurs clés.

e) Commissions d'éthique

Plusieurs des lois américaines mentionnées ci-dessus créent une commission d'éthique. Celle-ci a pour mandat d'appliquer et d'interpréter les règles d'éthique, de jouer un rôle d'éducation à l'égard des règles et de conseiller les administrateurs du gouvernement qui traitent des problèmes de conflits d'intérêts. L'existence d'une telle commission est le corollaire inévitable de l'approche législative. C'est un peu comme si on adoptait une loi sur les valeurs mobilières, qui, en autres, constituerait une commission pour en assurer l'observation.

Ces commissions portent divers noms. Par exemple, au palier fédéral aux États-Unis, on trouve le "Office of Government Ethics"; au palier des états, on trouve des organismes comme des "State Ethics Commission" (par exemple à Hawaï, en Caroline du Sud et au Massachusetts) ainsi que diverses variantes comme "State of Florida Commission on Ethics", "State of Wisconsin Ethics Board" et "Illinois Board of Ethics". Certaines commissions ont un mandat plus large qui se traduit dans leur nom, par exemple la "State of California Fair Political Practices Commission".

Bon nombre de ces commissions d'État ont un mandat qui dépasse la notion d'éthique dans le secteur public dont traite le présent rapport. Ainsi, les règles régissant le financement des élections, les contributions électorales et leur divulgation sont administrées par certaines de ces commissions. Au Canada, l'aide financière sous forme de contributions aux campagnes électorales est traditionnellement distincte des honoraires interdits (qui, compte tenu des dispositions du Code criminel, sont éminemment une question de conflit d'intérêts), à la condition que ces contributions ne constituent pas une forme déguisée d'honoraires interdits. Comme le signale à la page 18 le Livre vert de 1973, Les membres du Parlement et les conflits d'intérêts, les dépenses d'élections constituent un sujet étroitement lié à celui des conflits d'intérêts; cependant, étant donné la complexité croissante des deux domaines, il vaut mieux les traiter séparément. Il faut reconnaître que les dispositions touchant les conflits d'intérêts demeureront incomplètes à moins qu'il n'y ait également des dispositions portant sur les contributions électorales.

En 1974, dans l'année qui a suivi le dépôt du Livre vert, le Parlement a adopté la Loi sur les dépenses d'élections (S.C. 1973-1974, chapitre 51) précisément à cette fin; c'est pourquoi nous avons maintenant au Canada, au palier fédéral, un régime juridique distinct pour les contributions et les dépenses électorales, administré par le Commissaire des élections du Canada. De même, dans plusieurs états américains, des commissions distinctes ont été mises sur pied à cette fin et elles sont indépendantes des commissions d'éthique des états. Cependant, les directeurs exécutifs d'un certain nombre de ces organismes nous ont appris qu'il y a de fréquentes communications entre eux et les commissions d'éthique afin d'assurer le respect de leurs diverses lois par une contre-vérification de certaines déclarations.

Ce qui frappe à propos des commissions d'éthique et des organismes semblables, c'est le rôle constant et dynamique qu'elles peuvent jouer pour sensibiliser et éduquer les fonctionnaires, et même le grand public, à l'essence des règles d'éthique. Nous avons consulté un certain nombre de leurs publications, visionné quelques productions vidéo et assisté à plusieurs colloques, et nous avons été étonnés de l'action

positive qu'il est possible de mener pour aider les gens à reconnaître les problèmes de conflits d'intérêts lorsqu'ils se présentent et à savoir comment les résoudre. En fait, le rôle d'éducateur d'un bon nombre de ces commissions nous semble plus important que leur rôle d'agent éxécutoire.

L'examen de ces grandes options nous mène aux conclusions suivantes: il n'est plus souhaitable ni praticable de s'en remettre à des règles tacites; l'élaboration d'un code d'éthique pour le secteur public a du bon; il faut abandonner l'expression "lignes directrices"; tout système législatif doit éviter l'approche statutaire des États-Unis; et la proposition concernant un conseiller en éthique est méritoire. Dans le prochain chapitre, les techniques d'intervention à l'égard des conflits d'intérêts, notamment le dessaisissement, la divulgation et les fiducies, sont abordées.

CHAPITRE 6

MOYENS DE MINIMISER LES CONFLITS D'INTÉRÊTS: LE DESSAISISSEMENT, LES FIDUCIES ET LA DIVULGATION

Selon le premier principe de l'éthique que nous avons énoncé au chapitre 3, les titulaires de charges publiques ne doivent pas avoir d'intérêts personnels sur lesquels les activités gouvernementales auxquelles ils participent pourraient avoir un effet quelconque ou important. Dans le présent chapitre, nous abordons les différentes techniques qui peuvent ête employées afin de faire disparaître les intérêts susceptibles de créer un conflit.

a) Dessaisissement

En théorie, celui qui se dessaisit de ses avoirs et de ses liens commerciaux est libre d'exercer ses fonctions officielles sans risquer que ses intérêts économiques personnels entrent en conflit avec ses responsabilités au gouvernemment. On ne saurait nier en effet qu'une personne qui n'aurait aucun intérêt acquis jouirait d'une grande pureté de motifs lors de la prise de décisions et de l'application des politiques. Pourtant, il n'y a aucune certitude dans le domaine de la motivation humaine et de l'éthique; on pourrait même supposer que le titulaire de charge publique qui se serait dessaisi de tous ses actifs et de tous ses liens commerciaux pourrait par la suite en arriver à ressentir de l'envie, de la jalousie ou de l'insécurité par rapport aux personnes qui l'entourent. Si tel était le cas, pourrait-on toujours affirmer que ses actes officiels découlent de motifs aussi purs ?

La politique qui veut que le titulaire d'une charge publique se dessaisisse de certains intérêts et obligations de nature financière pour pouvoir détenir une charge publique, est à notre avis une forme de médecine préventive. Elle reconnaît que les titulaires de postes importants, y compris les ministres, doivent prendre des décisions majeures qui ont de vastes répercussions et que, inévitablement, ces répercussions atteindront tôt ou tard leurs actifs ou leurs intérêts personnels. Ainsi, pour éviter que le titulaire ait constamment à s'inquiéter quant à savoir si une décision donnée aura une incidence sur l'un de ses intérêts, et pour éviter de donner l'impression qu'il pourrait être en mesure de s'accorder des avantages, il a été décidé d'éliminer le problème avant qu'il ne se présente en exigeant des titulaires de postes supérieurs qu'ils se dessaisissent de certains types d'avoirs et d'intérêts.

Aux termes des lignes directrices présentement en vigueur, le dessaisissement applicable à certains titulaires de charges publiques importantes revêt plusieurs aspects. Il y a tout d'abord les biens exemptés, dont il n'est pas nécessaire de se dessaisir; il y a également la façon de se dessaisir de ses biens: soit par la vente à forfait sans lien de dépendance, soit en les plaçant en fiducie; enfin, il y a la déclaration publique comme autre option.

b) Fiducies

Plutôt que de les vendre, le titulaire peut se dessaisir de ses biens non exemptés en les plaçant en fiducie.

Les lignes directrices fédérales prévoient plusieurs variétés de fiducies, comme la fiducie en compte bloqué, la fiducie sans droit de regard et les sociétés de portefeuille en fiducie. Avec le temps, il se pourrait qu'on l'on conçoive d'autres sortes de fiducies pour répondre à la myriade de besoins dans ce domaine complexe et raffiné de la gestion des avoirs financiers. Pour le moment, nous nous contentons de commenter les dispositions actuelles, c'est-à-dire les fiducies en compte bloqué, les fiducies sans droit de regard, les cautions qui ont des incidences sur les fiducies.

1. Fiducie en compte bloqué

La fiducie en compte bloqué est une formule selon laquelle le fiduciaire a pour instruction de maintenir les avoirs exactement en l'état où ils se trouvaient lors de l'ouverture du compte. La personne qui ouvre un tel compte est habilitée à recevoir du fiduciaire les revenus produits par son compte et à être informée de toute déclaration exigée par la loi.

Tous les fonctionnaires peuvent actuellement se prévaloir de cette formule en vertu d'une décision rendue en 1982 par le Conseil du Trésor, sauf les quelques exceptions mentionnées dans les lignes directrices supplémentaires de certains ministères ou organismes.

Jusqu'à tout récemment, le sous-registraire général adjoint (SRGA) n'était pas autorisé à agir en tant que fiduciaire pour les fiducies en compte bloqué dont avaient besoin les fonctionnaires. Le SRGA est évidemment chargé de l'administration en général des fiducies des fonctionnaires. Toutefois, à la fin de septembre 1983, on a reconnu que rien n'empêchait le SRGA d'agir à ce titre et qu'en fait il le faisait déjà à l'égard des personnes nommées par le gouverneur en conseil. Puisque, en toute justice, tous ceux qui ont le droit d'établir une fiducie en compte bloqué devraient pouvoir se prévaloir des services du SRGA à titre de fiduciaire, les membres du Conseil du Trésor, le Bureau du Conseil privé et le Bureau du SRGA ont accepté le principe.

En ce qui concerne les personnes nommées par le gouverneur en conseil, le principe de la fiducie en compte bloqué, le SRGA servant de fiduciaire, découlait des lignes directrices à l'intention des ministres de la Couronne annoncées par le Premier ministre en 1973 et il a été inclus, de ce fait, dans les lignes de conduite touchant les personnes nommées par le gouverneur en conseil de 1974. Les lignes directrices visant le personnel soustrait des ministres, dans leur version de 1975, prévoyaient également des fiducies en compte bloqué, pour lesquelles le SRGA pouvait servir de fiduciaire.

À de rares exceptions près, c'est le plus souvent le SRGA qui a servi de fiduciaire pour les fiducies en compte bloqué plutôt qu'un autre fiduciaire admissible. Les rares exceptions portaient en général sur des cas où la personne en cause avait déjà prévu ou entrepris d'établir une forme quelconque de fonds de retraite; la fiducie en compte bloqué reprenait tout simplement des dispositions déjà prises pour conserver certaines actions, conformément à l'une des formules admises par les lignes directrices.

Le principal avantage d'une fiducie en compte bloqué est que la personne en cause sait que les biens qui y sont placés lui seront remis sans modification, sauf partage ou rachat des actions, dès qu'elle ne sera plus soumise aux lignes directrices. Le recours aux services du SRGA pour une fiducie en compte bloqué représente une économie importante puisque, à part quelques frais nécessaires à l'établissement de la fiducie, il n'y a pas d'autres frais étant donné que le coût d'administration relève du budget ordinaire du SRGA.

Au cours de la période où le personnel soustrait des ministres et les personnes nommées par le gouverneur en conseil pouvaient placer leurs biens dans des fiducies en compte bloqué, ceux-ci se sont prévalus de cette option que dans une faible mesure. Dans certains cas, on plaçait les actions en fiducie en compte bloqué au lieu de les vendre parce qu'elles avaient une valeur sentimentale, mais très peu de valeur intrinsèque, ou parce qu'on avait hérité de ces actions d'un proche parent et l'on ne voulait pas faire de changement ou encore parce qu'on prévoyait ne pas être longtemps au service de l'État avant la retraite.

Un certain nombre de fiducies en compte bloqué contenaient des actions sans valeur. Dans plusieurs cas, ces actions sans valeur ont commencé à s'échanger activement et le SRGA a alors jugé bon de permettre aux personnes en cause de transférer leurs avoirs dans une fiducie sans droit de regard.

La plupart des fiducies en compte bloqué ne contenaient qu'un petit nombre de valeurs cotées en bourse, et il était entendu que ces valeurs ne devaient comprendre aucun titre que le

SRGA devrait "gérer" autrement que pour percevoir les dividendes, recevoir les actions fractionnées ou matérialiser les produits des titres qui pourraient être vendus automatiquement. Les fiducies en compte bloqué n'ont jamais été considérées appropriées pour les titres convertibles, les biens immobiliers ou d'autres placements qui exigent l'intervention du propriétaire ou des personnes agissant à titre de fiduciaires intervivos.

Les fiducies en compte bloqué comportent certains désavantages. Ainsi, il est arrivé que des actions fassent l'objet d'une offre d'achat dont l'instrument de fiducie ne permettait pas au SRGA de tenir compte . De telles offres restent en vigueur jusqu'à ce que l'acheteur ait obtenu 90% des actions. À ce moment-là, toutefois, le fiduciaire peut donner suite à l'obligation de rachat ou d'échange. De tels problèmes se sont posés lors de l'acquisition par Genstar de la "Canada Permanent" et de la fusion de la "Unity Bank" avec la Banque provinciale, suivie de la fusion de cette dernière et de la Banque canadienne nationale. Il est arrivé, à quelques occasions, aux débuts du Bureau du SRGA, qu'une action convertible soit acceptée dans une fiducie en compte bloqué. Dans un cas, il a été impossible de convertir l'action et le propriétaire a dû considérer cette perte comme l'un des "coûts" des lignes directrices. Dans un autre cas, une personne détenait un très petit nombre d'actions convertibles susceptibles de rachat ou de conversion par l'entreprise. Comme plus de 90 % des actions avaient été converties, le Bureau du SRGA a jugé que la conversion ne constituait pas une forme de gestion des avoirs. De nos jours, il est peu probable qu'une action convertible soit acceptée dans une fiducie en compte bloqué à moins d'avoir convenu avant l'exécution de l'accord de fiducie, de conditions précises, connues du disposant et du fiduciaire.

Comme on n'a pas fait de publicité auprès des fonctionnaires quant à l'option des fiducies en compte bloqué par le biais du SRGA, très peu s'en sont prévalus. Le nombre de fiducies en compte bloqué est petit, mais il faut signaler à cet égard que les lignes directrices touchant les ministres et le personnel soustrait ne permettent plus les fiducies en compte bloqué depuis 1979.

2. Fiducie sans droit de regard

La fiducie sans droit de regard est une formule selon laquelle le fiduciaire est habilité à décider de tout investissement en ce qui a trait à la gestion des avoirs du compte, sans recevoir de directives de son client ni être soumis à sa surveillance. Le disposant ne reçoit aucun renseignement autre que ce qui est nécessaire pour l'évaluation annuelle du compte et pour les déclarations exigées par la loi. Il peut percevoir les revenus produits par son compte et déposer ou retirer des capitaux à son gré.

Les fiducies sans droit de regard existent depuis l'établissement des lignes directrices en 1973 et peuvent servir de moyen de dessaisissement pour tous les groupes. En fait, des fiducies sans droit de regard ont été ouvertes dans plusieurs cas longtemps avant la publication des lignes directrices et il a fallu récrire certaines des dispositions de ces comptes pour s'assurer qu'elles étaient conformes aux exigences des lignes directrices.

Il faut signaler que le SRGA ne peut servir de fiduciaire pour une fiducie sans droit de regard et que les personnes nommées par le gouverneur en conseil peuvent choisir parmi un plus grand groupe de fiduciaires que les ministres et le personnel soustrait des ministres. Les personnes nommées par le gouverneur en conseil peuvent choisir comme fiduciaire toute personne habituée à servir de fiduciaire, avec qui elles n'ont aucun lien de dépendance, alors que les ministres, en vertu des lignes directrices pertinentes doivent prendre comme fiduciaire soit une compagnie de fiducie soit un membre de l'Association des courtiers en valeurs mobilières du Canada. Ce fiduciaire peut être unique ou non, mais il a toujours un vote décisif.

Le SRGA agit souvent comme intermédiaire pour l'établissement de fiducies sans droit de regard et il doit décider si les dispositions adoptées par le disposant et le fiduciaire sont conformes aux lignes directrices en cause. Le SRGA a simplifié cette procédure en offrant des specimens d'instruments de fiducie sans droit de regard à ceux qui veulent ouvrir un tel compte. Ces specimens ou précédents comprennent des documents qui peuvent servir dans toutes les provinces du Canada (y compris le Québec, où la terminologie et les concepts juridiques dans le domaine des fiducies sont quelque peu différents). Il offre également des adaptations de plusieurs contrats visant des comptes discrétionnaires entre les courtiers en valeurs et leurs clients. Bref, le SRGA a tenté de faire en sorte que l'on puisse utiliser la méthode la plus simple d'ouvrir un compte de fiducie sans droit de regard, eu égard aux conditions essentielles exposées dans les lignes directrices.

La fiducie sans droit de regard doit être irrévocable et doit demeurer en vigueur tant que le disposant est titulaire d'un poste auquel s'appliquent les lignes directrices sur les conflits d'intérêts ou jusqu'à son décès. Si les actifs sont épuisés parce que le disposant a retiré des capitaux ou a fait des legs à des bénéficiaires, la fiducie se termine à toutes fins utiles, et peut être révoquée. En pratique, cependant, il peut être à l'avantage du disposant de maintenir la fiducie au cas où il voudrait faire des placements à l'avenir ou hériterait des biens non exemptés qu'il ne pourrait conserver personnellement. La fiducie doit être réputée appartenir à une juridiction donnée. Il s'agit d'ordinaire de la province où les actifs sont situés ou de celle où habite le disposant. La fiducie est ainsi assujettie aux lois fiduciaires de

la juridiction en cause, en fonction desquelles sont interprétées les clauses et conditions de l'instrument.

Le désavantage de ce genre de fiducie est que les frais d'établissement sont souvent élevés par rapport à la valeur des biens mis en fiducie. Si la valeur des biens en fiducie est considérable, le revenu compense les coûts; cependant, ceux qui se sont sentis obligés d'établir une fiducie sans droit de regard ont souvent dû verser une somme plus considérable que le revenu produit pour conserver le privilège de cet outil d'investissement.

3. Sociétés de portefeuille en fiducie pour les ministres du Cabinet

Lorsque les ministres ont établi des sociétés de portefeuille à des fins de planification testamentaire, ils peuvent déposer en fiducie les droits qu'ils possèdent dans une telle société. Le fiduciaire ne peut se départir des droits placés en fiducie ni les modifier d'aucune autre façon. Le sous-registraire général adjoint peut agir à titre de fiduciaire de cette société.

Lorsqu'ils établissent de telles sociétés de portefeuille en fiducie, les ministres peuvent prendre des dispositions pour qu'une tierce personne exerce leur droit de vote relativement à leurs intérêts dans ladite société de portefeuille, pourvu que ces dispositions n'entraînent pas de conflits d'intérêts. Ils ne peuvent toutefois pas être consultés au sujet de la disposition des biens détenus par la société de portefeuille qui constitueraient des biens réglementés en vertu des lignes directrices à l'intention des ministres de la Couronne, ni en être informés.

Les sociétés de portefeuille en fiducie sont une innovation récente, car elles n'ont été permises qu'en avril 1980 par les lignes directrices d'avril 1980 à l'intention des ministres de la Couronne. Parce que ces fonds fiduciaires exigent la constitution d'une société familiale de portefeuille à des fins de planification testamentaire, cette formule ne convient pas à un grand nombre de personnes.

En pratique, une fiducie sans droit de regard peut inclure une société de portefeuille, particulièrement à l'égard des personnes nommées par le gouverneur en conseil qui ne disposent pas de l'option. L'option de la fiducie en compte bloqué dont peuvent se prévaloir les personnes nommées par le gouverneur en conseil n'est cependant pas utilisable pour une société de portefeuille, puisqu'il n'est pas nécessaire de constituer une telle société dans le cas d'une simple fiducie en compte bloqué.

La société de portefeuille en fiducie est un mode utile de dessaisissement pour les ministres qui ont des avoirs

substantiels et qui ont déjà pris des dispositions qui exigent que ces avoirs soient gérés convenablement par le moyen d'une société de portefeuille. Le désavantage d'une telle fiducie est qu'il s'agit d'une méthode extrêmement dispendieuse pour quelqu'un dont les moyens sont modestes et qui aurait préféré une fiducie en compte bloqué.

4. Cautions

Il arrive que des titres soient déjà donnés en caution pour un emprunt à une institution financière. Cela se produit par exemple lorsqu'une personne nommée par le gouverneur en conseil a fait auprès d'une banque un emprunt garanti par des actions cotées en bourse. Il s'agit alors de savoir comment l'on peut se dessaisir de telles actions.

Il y a deux façons de traiter un tel cas. La première consiste à transférer la caution à un fiduciaire qui s'engage alors envers le prêteur à garantir le prêt selon une formule quelconque. La seconde, employée dans une situation temporaire, consiste à convenir que la garantie équivaut à une fiducie sans droit de regard. Par exemple, un haut fonctionnaire muté à Ottawa, incapable de vendre sa maison, avait donné ses titres en garantie à une banque pour emprunter suffisamment d'argent pour s'installer à Ottawa. Cette garantie était détenue par la banque, et on avait convenu que les valeurs seraient placées en fiducie lorsqu'elles ne seraient plus nécessaires comme garantie. Au début, on considérait que de telles dispositions équivalaient à une fiducie sans droit de regard; si l'on veut être rigoureusement exact, on pourrait faire valoir que c'est tout autant une fiducie en compte bloqué. En fait, il s'agira d'une fiducie en compte bloqué ou d'une fiducie sans droit de regard selon les circonstances au moment où l'emprunt prend fin. Dans un cas comme dans l'autre, il est toujours possible que les titres soient vendus pour rembourser le prêt et il n'y aurait donc aucun avantage à les placer en fiducie.

5. Considérations fiscales

Le Bureau du SRGA ne donne pas de conseils fiscaux. Les personnes soumises aux lignes directrices sont informées que toutes les dispositions particulières qu'elles prennent pour leurs biens peuvent avoir des conséquences fiscales et on leur recommande de consulter un avocat et un comptable.

6. Vérification des dispositions de fiducie

Des vérifications sont nécessaires pour les fiducies sans droit de regard, les sociétés de portefeuille en fiducie et les fiducies en compte bloqué. Dans le cas des fiducies sans droit de regard et des sociétés de portefeuille en fiducie, la vérification est d'ordinaire prévue par une clause de

l'instrument. Pour les fiducies en compte bloqué, on considère que le droit au secret exige que la vérification soit faite par un vérificateur de l'extérieur plutôt que par un fonctionnaire. Présentement, un comptable agréé vérifie chaque année les fiducies en compte bloqué dont le SRGA est fiduciaire et le rapport de vérification est revu par le contrôleur général du Canada avant qu'un rapport définitif ne soit envoyé au Premier ministre, l'informant que l'administration des fiducies en compte bloqué au Bureau du SRGA a été correctement effectuée.

7. Coût des fiducies

Le remboursement des coûts des fiducies fait l'objet d'une nouvelle politique adoptée en février 1982 et applicable rétroactivement à la date de la publication du dernier ensemble de lignes directrices: les lignes directrices d'avril 1980 à l'intention des ministres de la Couronne. Cette politique sur les coûts des fiducies couvre toutes les sortes de comptes en fiducie ouverts pour se conformer à toutes les règles sur les conflits d'intérêts du gouvernement.

Lorsqu'une fiducie en compte bloqué est établie avec le SRGA, comme on l'a déjà dit, il n'y a pas de coûts à recouvrer, mais lorsqu'une fiducie est établie avec l'aide d'avocats, de comptables agréés ou d'autres conseillers qualifiés, il peut y avoir des frais d'établissement, et la nouvelle politique prévoit qu'ils seront remboursés s'ils sont raisonnables. Le SRGA a parfois désavoué certaines réclamations déraisonnables.

Les coûts de fermeture d'une fiducie sont également remboursables. Il n'y a guère eu d'expérience à cet égard jusqu'à maintenant, mais il semble n'y avoir eu aucun problème.

Le remboursement des frais d'administration et d'entretien des fonds fiduciaires se fonde sur une formule par laquelle une somme annuelle allant jusqu'à la moitié de 1 % de la valeur marchande des avoirs peut être remboursée. Puisqu'il n'y a aucune somme minimum de fixée pour les biens en fiducie, cela signifie que les petits fonds coûtent au disposant beaucoup plus qu'il ne peut recouvrer en vertu de la politique, alors que les fonds importants produisent des revenus amplement suffisants pour couvrir tous ses frais.

Pour assurer un traitement plus équitable à ceux qui ouvrent des fonds fiduciaires sans droit de regard pour de très petites sommes, le Conseil du Trésor étudie présentement la possibilité d'introduire un droit minimum. Si l'option de la fiducie en compte bloqué est offerte au personnel soustrait, par exemple, bon nombre de ceux qui auraient été désavantagés par la politique de remboursement des coûts opteraient probablement pour cette formule.

c) Divulgation

La divulgation peut être une alternative au dessaisissement par la vente ou par le placement en fiducie, au moins à l'égard de certaines sortes de biens et d'intérêts pour plusieurs catégories de personnes, en vertu des lignes directrices actuelles.

À l'égard des conflits d'intérêts, le fait de communiquer au public la nature et l'importance des biens et des autres intérêts du titulaire de charge publique suffit à assurer que celui-ci agisse, et soit forcé de le faire, dans l'intérêt du public. Connaissant les intérêts de la personne en cause, chacun pourra s'assurer qu'elle agit sans être influencée par ces intérêts lorsqu'elle prend une décision. De même, ceux qui recevront des conseils de cette personne ou entendront ses commentaires seront au courant de son intérêt, puisqu'il aurait été rendu public. Au besoin, ils pourront, en appréciant ses conseils, tenir compte du fait qu'il est intéressé à l'affaire au plan privé aussi bien qu'au plan public.

Cette approche est suivie à certains égards au Canada; par exemple, les membres des conseils municipaux doivent déclarer qu'ils sont intéressés de façon personnelle à une question à l'ordre du jour du conseil et se retirer de la table du conseil pendant le débat et le vote sur cette question. Il y a d'autres exemples. Cependant, les délibérations du Cabinet et des fonctionnaires étant secrètes, la divulgation au public des biens des ministres et des hauts fonctionnaires n'aurait pas le même effet.

La méthode de la déclaration publique a été élargie lorsque vous avez annoncé, monsieur le Premier ministre, en décembre 1973, que les ministres pourraient dorénavant se prévaloir, parmi les diverses façons de se conformer aux lignes directrices, de l'option d'une déclaration publique de certains biens qui ne risquaient pas d'être source de conflit au lieu de s'en dessaisir.

Il y a deux sortes de divulgations: la divulgation confidentielle et la déclaration publique. Dans le premier cas, on déclare ses biens et ses intérêts à un fonctionnaire désigné pour lui permettre de se rendre compte qu'il n'y a pas de conflit d'intérêts. Ce dernier peut à son tour certifier aux autres que le titulaire de charge publique en cause, qui a fait une divulgation confidentielle, se conforme aux lignes directrices sur les conflits d'intérêts.

Comme son nom l'indique, la déclaration publique comporte le dépôt de déclarations ou de rapports indiquant les biens et les autres intérêts, mais dans ce cas les renseignements sont accessibles au public. La déclaration publique des biens faite dans les municipalités et à la Chambre des communes peut

révéler un conflit d'intérêts ou un parti pris de la part du conseiller municipal ou du député en cause, dont on peut tenir compte pendant les délibérations ou le vote. La déclaration publique peut aussi montrer qu'une personne détient des biens qui, par leur nature, ne risquent guère de donner lieu à des conflits d'intérêts, mais ne constituent pas des biens exemptés. C'est là l'objet de la disposition relative à la déclaration qui figure dans les lignes directrices actuelles à l'intention des ministres et des personnes nommées par le gouverneur en conseil. À notre avis, la disponibilité de cette option pourrait être élargie sans augmenter de façon substantielle les préoccupations à l'égard des conflits d'intérêts.

La divulgation confidentielle est implicite dans les lignes directrices complémentaires des ministères qui exigent que les fonctionnaires révèlent à leur sous-ministre des intérêts personnels qui pourraient susciter un conflit d'intérêts, comme première mesure en vue d'éviter ou d'éliminer le conflit. Elle est également implicite dans l'administration des fiducies en compte bloqué et dans certains aspects des autres fonctions du sous-registraire général adjoint.

Les lignes directrices concernant les ministres et les personnes nommées par le gouverneur en conseil couvrent de façon assez exhaustive le sujet des biens soumis à la déclaration publique ou à la divulgation confidentielle. Les deux méthodes, soit la divulgation confidentielle (pour assurer l'observation des lignes directrices) et la déclaration publique (pour répondre à certaines exigences) sont en usage en vertu des régimes actuels.

d) Divulgation par les lois sur la transparence gouvernementale

La divulgation s'applique d'ordinaire par des procédures exigeant que les titulaires de charges publiques fassent des déclarations écrites ou verbales, qui révèlent la nature et l'importance de leurs intérêts financiers et de leurs autres intérêts privés qui pourraient susciter des conflits d'intérêts.

On peut cependant appliquer le concept de la divulgation en exigeant par une loi que les affaires publiques soient transigées en public - surtout lorsque des organismes gouvernementaux tiennent des délibérations qui aboutissent à des décisions comme l'octroi ou la révocation d'un permis, la délivrance de permis spéciaux, etc. Aux États-Unis, on parle familièrement de "government in the sunshine" (la transparence gouvernementale), d'après la loi adoptée en 1976 et intitulée "Government in the Sunshine Act". Ce principe de la transparence du processus décisionnel vise à faire en sorte que les décisions soient prises en fonction du bien public, plutôt qu'en fonction d'intérêts privés ou de considérations personnelles. Ainsi, on doit fournir l'information au public tout en protégeant les droits

des individus et la capacité du gouvernement de s'acquitter de ses fonctions. Cette loi s'insère bien dans la tradition de divulgation qui fait partie de l'instinct démocratique américain. L'intention de cette loi se réalise par deux moyens, des "réunions ouvertes" et des règles régissant "les communications ex parte".

Si nous avons étudié les lois sur la transparence gouvernementale, c'est que de telles dispositions peuvent remplacer ou compléter les méthodes présentement en usage pour dissiper les craintes que pourraient susciter les "négociations en coulisse" lorsque, par exemple, un tribunal décide d'accorder un permis, ou qu'un office de commercialisation décide de modifier les contingentements, ou lors de toute autre mesure décisionnelle semblable. Il se pourrait bien que l'adoption de lois sur la transparence gouvernementale constitue la prochaine étape après la mise en oeuvre de la Loi sur l'accès à l'information. De nouvelles mesures en vue de s'assurer que les affaires publiques sont transigées en public pourraient peut-être mieux montrer à la population que les processus décisionnels veulent son bien. Nous n'envisageons pas d'appliquer cette transparence juridique à la plupart des activités des ministères, mais plutôt au fonctionnement de certains tribunaux et organismes du gouvernement fédéral.

Nous croyons que l'idée mérite un examen approfondi. À l'heure actuelle, aucune des provinces n'a adopté une législation en ce sens, mais on nous apprend qu'un comité de l'Ontario y songe peut-être. Par ailleurs, le ministère fédéral de la Justice, dans le cadre d'un projet de réforme du droit administratif, étudie actuellement la procédure suivie par les tribunaux et organismes, ce qui l'amènera à se pencher sur les communications ex parte et la transparence. Ce ministère serait donc sans doute le mieux placé pour effectuer, dans le cadre de son vaste projet, l'examen approfondi que nous recommandons ici.

Si le gouvernement décide d'étudier cette question plus en profondeur et choisit par la suite d'adopter de telles dispositions, elles pourraient faire partie du programme d'ensemble que nous proposons ici. Il faudrait ajouter des dispositions portant sur les réunions ouvertes et les communications ex parte pour certains organismes et certains tribunaux quasi-judiciaires. On pourrait y arriver soit par une seule loi (comme au palier fédéral aux États-Unis), soit par des modifications particulières aux lois constituantes des organismes auxquels les nouvelles règles devraient s'appliquer. Si l'échéancier de mise en oeuvre le permet, ces modifications pourraient faire partie de la Loi sur l'éthique dans le secteur public.

(e) Conclusion

Les opinions des personnes qui ont été soumises aux diverses modalités administratives visant à réduire les conflits

d'intérêts sont mentionnées plus loin. Il suffit pour le moment de constater que ces modalités, quelle qu'en soit la nécessité, sont complexes, qu'elles peuvent occasionner aux personnes qui y sont assujetties des problèmes graves sur le plan financier et sur le plan de la carrière et qu'elles doivent être administrées avec le plus grand soin et appliquées seulement dans les cas de stricte nécessité.

CHAPITRE 7

HISTOIRE ET ÉVOLUTION DES LOIS ET DES LIGNES DIRECTRICES FÉDÉRALES EN MATIÈRE DE CONFLITS D'INTÉRÊTS

a) Introduction: Un continuum de règles régissant l'éthique

La question de l'éthique dans la conduite des affaires du gouvernement ne date pas d'hier. Le danger de se retrouver dans une situation équivoque dans l'exercice de ses fonctions officielles est depuis longtemps reconnu. En dehors du domaine de l'enseignement religieux et philosophique, les premières tentatives officielles au Canada de traiter de ce sujet se sont exprimées dans les dispositions du droit pénal. Cela était généralement la règle aux XVIIIe et XIXe siècle dans les démocraties où l'anglais était parlé; on adoptait alors des lois traitant d'infractions comme la corruption et la fraude. Bon nombre de ces dispositions législatives remontaient à des lois adoptées des siècles plus tôt par le Parlement britannique. Les dispositions du droit pénal qui visent les abus flagrants découlant de conflits d'intérêts et de comportements contraires à l'éthique de la part de titulaires de charges publiques servent d'arrière-plan aux règles sur les conflits d'intérêts.

On constate l'existence d'un spectre de dispositions: à une extrémité, les sanctions rigoureuses du Code criminel qui portent sur les infractions graves, comme la fraude et la corruption de fonctionnaires; au centre, des dispositions législatives qui régissent la conduite des titulaires de charges publiques et qui font donc partie du droit (mais en général du droit non pénal) et qui traitent des problèmes de conflits; à l'autre extrémité, des énoncés généraux ou "codes" des comportements jugés appropriés.

b) Expansion de l'ensemble des lois et des règles portant sur les conflits d'intérêts

Pendant de longues années, seul le droit pénal, et certaines exigences procédurales quant à la conduite des employés du gouvernement, comprises dans les lois qui créaient leurs fonctions, traitaient des problèmes de conflits d'intérêts. Par la suite, à mesure que se modifiaient la nature et les fonctions du gouvernement et des titulaires de charges publiques, ces dispositions rudimentaires ont été complétées par les lois non

pénales mentionnées ci-dessus. Il existe de nombreux exemples (traités longuement au chapitre suivant), notamment l'article 32 de la Loi sur l'emploi dans la Fonction publique qui limite rigoureusement l'activité politique partisane des fonctionnaires et le paragraphe 3(5) de la Loi sur l'Office national de l'énergie qui interdit aux membres de l'Office de posséder des actions ou de détenir un intérêt dans des sociétés du secteur de l'énergie.

Pour ajouter à cet ensemble de règles de conduite on a commencé à rédiger des "codes" destinés à donner le ton de la conduite des titulaires de charges publiques et qui prévoient également des procédures visant à la fois à prévenir et à résoudre les conflits d'intérêts.

C'est là l'origine des "lignes directrices". Pour certains, cette évolution ne traduit guère autre chose qu'une tentative d'exprimer par écrit le "code de conduite tacite" qui régissait les hommes et les femmes à une époque où tout était plus simple. Même si la question des lignes directrices sur les conflits d'intérêts au palier fédéral au Canada n'a pas été examinée en profondeur avant la fin des années 1960 et qu'elle n'a donné lieu à des décrets du Conseil qu'au début et au milieu des années 1970, certaines initiatives ont néanmoins été prises dans le domaine dès les années 1920, date où le premier décret du Conseil à ce sujet était adopté pour empêcher les fonctionnaires de travailler à l'extérieur en dehors des heures de travail - le vieux problème de servir deux maîtres.

Notre mandat ne comprend pas l'étude des règles en matière de conflits d'intérêts qui régissent les députés et les sénateurs. Il existe un certain nombre de dispositions législatives à leur égard, comme celles que l'on trouve dans le Code criminel et dans la Loi sur le Sénat et la Chambre des communes, auxquelles s'ajoutent certaines réserves du Règlement de la Chambre. Ensemble, elles établissent un cadre légal en matière d'éthique qui délimite les activités permises aux parlementaires.

Néanmoins, nous prenons acte de plusieurs dispositions qui s'appliquent généralement aux députés et aux sénateurs parce que notre mandat nous oblige à étudier la situation des ministres et des secrétaires parlementaires. Puisque ceux-ci seront choisis parmi les membres de la Chambre des communes ou du Sénat, les règles d'éthique auxquelles sont assujettis les parlementaires constituent un fondement à partir duquel ont été établies les lignes directrices à l'intention des ministres et des secrétaires parlementaires.

c) Premières dispositions législatives touchant la fonction publique

La Loi de 1908 modifiant la Loi sur le service civil constituait une première étape en vue d'éliminer les méfaits du favoritisme, en appliquant le principe du mérite au "service intérieur" (les fonctionnaires d'Ottawa) et en rendant le fonctionnaire qui prenait part à toute activité politique, passible de congédiement. Selon le professeur Kenneth Kernaghan, cependant, le patronage continuait de plus belle dans le "service extérieur" (les fonctionnaires travaillant à l'extérieur d'Ottawa) et la possibilité de nominations temporaires pour des motifs politiques au service intérieur a presque détruit le système du mérite dans la décennie qui a suivi l'adoption de cette loi.[1]

La Loi sur le service civil de 1918 renforçait l'interdiction de l'activité politique en accordant le pouvoir exclusif de nomination et de promotion à la Commission du service civil plutôt qu'aux politiciens. L'article 55 de la Loi, qui n'a pas été modifié avant 1961, stipulait que les fonctionnaires ne devaient pas se livrer à un travail partisan à l'égard des élections fédérales ou provinciales. Ils ne pouvaient non plus contribuer à la caisse d'un parti, ni recevoir de l'argent ou traiter de quelque façon avec celle-ci, sous peine de congédiement.

d) Décrets du Conseil régissant les conflits d'intérêts: la méthode gradualiste

C'est en 1925 qu'était promulgué le premier décret du Conseil (CP 360) à l'égard d'un problème de conflit d'intérêts. Le décret déclarait tout simplement que si des employés étaient pris à vendre des biens ou à se livrer à un commerce quelconque pendant les heures de travail, ils étaient passibles de suspension ou de renvoi par le sous-chef.

C'était le début de l'approche gradualiste au dossier des conflits d'intérêts. Au lieu d'un énoncé général et global sur les normes de conduite appropriées pour les titulaires de charges publiques, on établissait des règles particulières lorsqu'il se présentait un problème. Cette approche fragmentaire cadrait bien avec la tradition britannique qui ne s'occupe des problèmes que lorsqu'ils ont fait assez de bruit pour mériter qu'on s'en occupe sérieusement; c'est alors qu'une solution particulière est adoptée.

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1 "The Political Rights and Activities of Canadian Public Servants", Kenneth Kernaghan, ed., Public Administration in Canada, Toronto, Methuen, 2, cd., 1971, p. 386.

Ainsi, un autre décret du Conseil (CP 1802) était publié le 7 août 1931, stipulant que, par suite du problème de chômage, les fonctionnaires n'avaient pas le droit d'utiliser leurs congés annuels pour occuper un emploi temporaire aux pistes de course, dans les expositions ou dans la vente de biens de quelque sorte que ce soit. Les contrevenants étaient passibles de suspension, d'enquêtes et des sanctions appropriées. Huit ans plus tard, ce décret était abrogé, dans le cadre d'un examen des règles en vigueur, par le décret CP 1/1803.

Il était remplacé par une disposition plus générale, le décret CP 71/751 du 29 mars 1939, selon lequel les fonctionnaires dont le traitement dépassait $1 200 ne devaient pas occuper un emploi à l'extérieur sauf sur autorisation du Conseil du Trésor.

Pour préciser la question, un nouveau décret (CP 1803) était promulgué le 8 juillet 1939; il abrogeait le décret de 1931 portant sur le travail temporaire aux pistes de course, etc. (CP 1802) et présisait que ces emplois extérieurs seraient dorénavant assujettis aux dispositions de la nouvelle règle figurant au décret CP 71/751. Trois ans plus tard, le 19 août 1942, on adoptait le décret CP 128/7359 qui suspendait le décret CP 71/751 et permettait à des sous-chefs d'autoriser des emplois extérieurs. Le 27 août 1947, le traitement des employés du gouvernement qui pouvaient occuper un emploi à l'extérieur était porté à $1 600 par le décret CP 192/3465, lequel annulait le décret CP 71/751.

Au début des années 1930, on s'inquiétait quelque peu de la participation des fonctionnaires à la politique active au palier municipal. Le décret CP 95 du 16 janvier 1932 établissait la règle que les fonctionnaires ne devraient pas participer à la politique municipale à moins d'avoir reçu un congé sans solde pour la durée de leur mandat. Cette règle était modifiée le 7 novembre 1932 par le décret CP 2463; à la discrétion du ministre, les fonctionnaires pouvaient accepter une charge municipale à la condition que les sommes qui leur étaient versées ne dépassaient pas $500 par année. Le décret CP 95 était modifié de nouveau le 8 avril 1948 (par le décret CP 1380) et la limite maximum de la rémunération que les fonctionnaires fédéraux pouvaient recevoir pour une charge municipale élective était portée à $900. Cette somme était augmentée en 1955 à $1 000 (par le décret CP 1955-717) et en 1958 à $1 500 (par le décret CP 1958-1568). Chacune de ces quatre dernières modifications disposait que la charge municipale ne devait pas nuire à l'exercice des fonctions régulières de l'employé.

Une période d'accalmie a suivi l'activité des années 1930, jusqu'au 21 mars 1951, date d'un décret du Conseil (CP 3/1440) qui traitait des employés du gouvernement qui détiennent un emploi en dehors des heures de travail. En bref, le décret édictait les règles suivantes:

- les employés du gouvernement qui désiraient détenir un second emploi ne pouvaient le faire qu'avec la permission du Conseil du Trésor;

- l'emploi extérieur ne devait pas entrer en conflit avec le travail du gouvernement et ne pouvait pas être de nature partisane; et

- les sous-chefs avaient le pouvoir de restreindre l'emploi extérieur d'un employé ou d'y mettre fin s'il était jugé soit que ce travail empêchait l'employé d'exercer ses fonctions, soit qu'il nuisait à son efficacité dans la fonction publique.

Ce décret demeura en vigueur jusqu'au 18 décembre 1973, date où il a été abrogé par le décret CP 1973-4064. À cette date, les lignes directrices au sujet des conflits d'intérêts touchant les fonctionnaires (CP 1973/4065) étaient approuvées et déposées à la Chambre des communes par le Premier ministre.

e) Décisions administratives qui précisent l'application des règles régissant l'éthique.

Au cours des années 50, une décision administrative fondée sur le bon sens a précisé un principe à l'égard de la rémunération reçue pour un emploi extérieur approuvé par le ministère. C'est là un bon exemple de la façon dont les décisions administratives étoffaient de temps à autre le sens et l'application des règles régissant l'éthique. En 1957, le vérificateur général Watson Sellar écrivait au sous-ministre des Finances K.W. Taylor, lui demandant comment régler le cas d'un employé qui avait reçu des honoraires d'une société privée pour avoir participé à une activité en dehors de ses fonctions régulières. L'employé avait la permission du Ministère de le faire et c'est également le Ministère qui payait ses frais de déplacement. M. Sellar voulait savoir quoi faire de l'argent qui avait été reçu de la société. Il fut décidé que l'employé devait rembourser ses frais de déplacement au Ministère.

f) Examen des politiques en matière de conflits d'intérêts au cours des années 1960.

Le temps était venu en 1960 de réexaminer certaines des règles restreignant l'activité politique des fonctionnaires. Le 12 août 1960, le décret CP 1960-1121 révoquait le décret CP 95 et ses modifications. Les dispositions particulières portant sur la participation à la politique municipale à titre de représentant élu étaient disparues.

L'effet du favoritisme sur les nominations aux postes relevant de la Commission du service civil avait considérablement diminué et à ce moment, 131 953 sur un total de 344 362

fonctionnaires civils étaient assujettis aux restrictions concernant l'activité politique. Bien que l'acceptation du principe du mérite par les groupes exclus ait varié d'un organisme à l'autre, les nominations politiques et les activités partisanes étaient plus fréquentes dans les organismes qui n'étaient pas visés par la Loi sur le service civil.

La Loi sur le service civil révisée de 1961 continuait d'interdire l'activité partisane et incorporait la recommandation du Rapport de la Commission du service civil sur l'administration du personnel dans le service public, déposé en décembre 1958 par M. A.D.P. Heeney, le président de la Commission. L'élément clé de la recommandation, repris dans la Loi sur le service civil du Canada (1961), était l'institution d'une enquête avant le renvoi. Aucun processus du genre n'existait avant 1961. L'article pertinent de la Loi se lit comme suit:

Ingérence dans la politique

61. (1) Nul sous-chef ou employé ne peut

a) se livrer à des menées politiques quelconques pour le compte d'un parti, lors d'une campagne électorale en vue de l'élection d'un député à la Chambre des communes, d'un député à la législature d'une province ou d'un membre du conseil du territoire du Yukon ou des territoires du Nord-Ouest; ni

b) verser à titre de contribution, recevoir ou de quelque façon manipuler de l'argent pour la caisse d'un parti politique.

(2) Quiconque enfreint le paragraphe (1) est passible de destitution.

(3) Nul ne peut être destitué pour une infraction au paragraphe (1) à moins que l'infraction alléguée n'ait fait l'objet d'une enquête à laquelle l'intéressé a eu l'occasion de se faire entendre en personne et par l'intermédiaire de son représentant.

Selon cette recommandation, toute personne pouvait déposer des accusations d'infraction à l'une ou l'autre des dispositions pour des raisons de politique partisane. Ces accusations devaient être présentées par écrit à un ministre de la Couronne et s'appuyer sur une déclaration assermentée. L'employé en cause devait alors être suspendu en attendant les résultats d'une enquête menée par le ministre de la Justice. S'il était jugé coupable, il devait être renvoyé; s'il était innocent, il devait être remis en fonction sans perte de salaire.

Le 30 novembre 1964, le Premier ministre Pearson écrivait à ses ministres pour souligner qu'il était important de maintenir des normes élevées de conduite et que leur personnel devait respecter les mêmes normes. Les domaines mentionnés dans cette lettre constituent le fondement des grands principes des lignes directrices en usage de nos jours. En fait, un des paragraphes de la lettre du Premier ministre a été utilisé presque mot pour mot dans les lignes directrices présentement en vigueur à l'égard des fonctionnaires:

> Il ne suffit nullement qu'une personne qui occupe un poste dans le Cabinet d'un ministre - ou tout autre poste de responsabilité dans la Fonction publique - observe la loi. Cela va sans dire, mais il faut beaucoup plus. Il lui faut non seulement se conformer à la loi, mais avoir également une conduite si irréprochable qu'elle puisse résister à l'enquête la plus minutieuse. La conduite des affaires publiques doit être à l'abri de tout doute en termes de normes morales, d'objectivité et d'égalité de traitement.

M. Pearson signalait également que les ministres et leur personnel ne doivent pas

- accorder un traitement de faveur à des personnes parce qu'ils les connaissent personnellement;
- être en reste avec une personne qui pourrait profiter d'une considération particulière ou qui pourrait demander un traitement de faveur;
- avoir des intérêts pécuniaires susceptibles d'entrer en conflit avec l'exercice de leurs fonctions officielles; et
- se servir à leur avantage de renseignements officiels.

Comme le fait remarquer le professeur Kernaghan:

> Malgré cette lettre, qu'on a appelée le code d'éthique de M. Pearson, des scandales ont éclaté par la suite et ont abouti à la démission de ministres, de législateurs et d'adjoints de ministres. On s'est cependant quelque peu désintéressé de l'éthique professionnelle dans le secteur public au cours de l'année 1967 et l'on n'a pas donné suite à l'idée de formuler un code d'éthique professionnelle applicable aux fonctionnaires aussi bien qu'aux titulaires élus de charges publiques.[2]

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2 Kernaghan, Kenneth, "The Ethical Conduct of Canadian Public Servants," Optimum, 4, n° 3 (1973), p. 6.

Adoptée en 1967, la Loi sur l'emploi dans la Fonction publique exigeait que les employés qui désiraient se livrer à une activité politique aux paliers provincial et fédéral obtiennent un congé de la fonction publique. Le congé pouvait être refusé si l'on jugeait que cette participation risquait de diminuer l'utilité future de l'employé pour la fonction publique. La Loi interdisait également d'autres sortes d'activité politique, par exemple travailler pour ou contre un candidat dans une élection provinciale ou fédérale. La participation des fonctionnaires à la politique municipale continuait de relever du Conseil du Trésor.

L'importance de la Loi sur l'emploi dans la Fonction publique (1967) en ce qui concerne l'activité politique des employés réside moins dans le fait que des restrictions sont énoncées que dans l'octroi de droits supplémentaires, dont celui de se porter candidat et celui de verser des contributions financières. Par ailleurs, une disposition fondamentale et universelle interdit de travailler pour ou contre un candidat ou un parti politique.

En ce qui concerne les congés, la Commission ne peut en accorder qu'à l'employé qui désire se porter candidat à une élection ou obtenir la nomination d'un parti. Rien dans la Loi ne l'autorise à en accorder pour toute autre forme d'activité politique.

Le 2 octobre 1967, M. O.G. Stoner, alors sous-secrétaire du Bureau du Conseil privé, écrivait au Premier ministre pour lui faire savoir que les contrôles à l'égard des conflits d'intérêts étaient à son avis aléatoires en comparaison de ceux du Royaume-Uni et des États-Unis. Il suggérait que le Premier ministre demande au président du Conseil du Trésor de formuler un règlement général.

Le Premier ministre ayant donné son accord, M. Robertson, qui était alors greffier du Conseil privé, écrivait le 11 janvier 1968 au secrétaire du Conseil du Trésor pour lui demander d'entreprendre une étude et d'élaborer des lignes directrices. Ainsi, le Conseil du Trésor publiait, en 1969, des lignes directrices concernant les mesures disciplinaires à l'égard des conflits d'intérêts.

Le 15 juillet 1968, M. Robertson saisissait le Premier ministre de la question des dispositions que les ministres devraient prendre pour éviter tout conflit d'intérêts découlant de liens avec des sociétés commerciales ou de dispositions financières. Il mentionnait en particulier le Manuel de la procédure officielle où l'on pouvait lire, à la page 350:

> Aucun conflit ne devrait exister ou sembler exister entre les intérêts privés d'un ministre et ses fonctions publiques. Au moment de sa nomination, on

s'attend donc à ce qu'il organise ses affaires privées de façon à prévenir les conflits d'intérêts. Ceci peut signifier l'abandon de certains postes d'administrateurs de sociétés commerciales.

Le Cabinet convenait de discuter les principes de base pour éviter les conflits d'intérêts et, en septembre 1968, le président du Conseil privé était chargé de revoir le dossier des conflits d'intérêts. Deux études ont été préparées pour lui, une par le professeur Jeremy Williams de l'Université de l'Alberta et l'autre par le professeur Yvon Marcoux, de l'Université Laval. L'étude de Williams a été présentée en septembre 1969 et celle de Marcoux en juin 1970; elles ont été par la suite déposées en Chambre.

Williams, reconnaissant que les conflits d'intérêts sont infiniment variés, soulignait qu'il faut limiter la portée de l'expression de sorte que seuls les intérêts personnels et les intérêts pécuniaires immédiats soient réputés donner lieu à des conflits. Selon lui, cette restriction constituait le point le plus approprié pour définir l'équilibre entre le bien public et l'avantage individuel.

Williams soulignait les dangers qui peuvent découler de conflits d'intérêts réels ou apparents. Selon lui, ce sont dans une large mesure les circonstances qui déterminent si des conflits d'intérêts réels ou apparents sont acceptables ou sont des maux qu'il faut combattre par la législation ou par un autre moyen approprié. Williams établissait une distinction entre les fonctionnaires, les législateurs et les ministres; selon lui, une fois exposées certaines règles fondamentales, il vaut mieux laisser ces personnes se guider d'après leur propre morale et leur propre conscience. En outre, il était d'avis que le domaine des conflits d'intérêts pourrait bien s'avérer réfractaire à toute réglementation. En effet, les circonstances peuvent varier considérablement selon le type de charge en cause et la sorte et l'importance de l'intérêt en jeu.

Williams exposait certaines règles cardinales conçues de façon à prévenir les formes les plus manifestes et les plus graves de conflits. Il élaborait ensuite des règles secondaires qui n'éliminaient pas la nécessité d'observer l'esprit aussi bien que la lettre des règles.

Faisant remarquer que c'est à l'individu qu'incombe au premier chef la responsabilité générale, Williams exposait certains recours, soit les sanctions criminelles, les réprimandes, le congédiement, l'annulation (de la décision de la personne influencée) et le dessaisissement. Il concluait qu'il était peu probable que les problèmes de conflits soient résolus par l'élaboration de règles. Selon lui, il faudrait observer la lettre et l'esprit de certains principes, qui pourraient varier selon la charge et la situation. Il déclare notamment, vers la

fin de son étude que la solution semble être de donner à un tribunal un certain pouvoir discrétionnaire dans certaines limites bien définies.

Le professeur Yvon Marcoux préconisait une démarche semblable. Il résumait diverses études sur la question des conflits d'intérêts et suggérait d'autres études à entreprendre avant de formuler des propositions définitives. Selon lui, il est d'autant plus important de régler les conflits d'intérêts que le gouvernement intervient de plus en plus dans toute une variété de domaines. Il avançait à cela des raisons parallèles à celles du professeur Williams, notamment:

(1) assurer l'efficacité de l'administration gouvernementale, (2) garantir à tous les citoyens un traitement égal et impartial, (3) empêcher que le titulaire de charge publique ne se serve de renseignements acquis dans l'exercice de ses fonctions dans son propre intérêt et (4) maintenir l'intégrité des institutions parlementaires et gouvernementales afin d'inspirer le respect du public et de conserver sa confiance.

Il recommandait la création de comités spéciaux des Communes et du Sénat pour étudier la rédaction d'un code d'éthique et de règles sur la déclaration des intérêts financiers à l'intention des députés et des sénateurs. Il recommandait aussi que les ministres se conforment à des exigences particulières en plus de celles qui s'appliqueraient aux autres parlementaires. À l'égard des membres des organismes de régie, Marcoux déclarait que le gouvernement devrait adopter comme politique d'inclure dans les lois constituantes de tous ces organismes des dispositions interdisant à leurs membres d'avoir des intérêts directs ou indirects dans des entreprises ou des activités du domaine soumis à leur réglementation.

Finalement, Marcoux recommandait d'adopter pour les parlementaires fédéraux le rapport du "Special Committee on Congressional Ethics" de l'Association du barreau de la ville de New York. Ce rapport contient un modèle de code de conduite et des règles concernant la déclaration des intérêts financiers.

g) Les années 1970: une décennie consacrée à rédiger des lignes directrices, à étudier la situation des parlementaires et à revoir les règles régissant les activités politiques des fonctionnaires

La réflexion consacrée à ce problème au cours des années 1960 a abouti dans les années 1970 à des mesures concrètes, à des lignes directrices écrites à caractère global.

Les études de Williams et de Marcoux sont devenues, dans une certaine mesure, des documents de travail pour un comité interministériel mis sur pied en avril 1970 à la demande de

M. Robertson, greffier du Conseil privé. Ce comité, présidé par M. Jean Boucher, sous-ministre des Approvisionnements et Services, et composé de sous-chefs des ministères et organismes les plus directement intéressés au domaine des conflits d'intérêts, devait élaborer une façon d'aborder les conflits d'intérêts pour les fonctionnaires. Le rapport définitif du comité a été soumis au président du Conseil privé en mars 1972.

Signalant que jusqu'alors la tradition avait réduit au minimum les problèmes de conflits d'intérêts dans la fonction publique, le Comité déclarait néanmoins qu'il fallait un système plus explicite pour que la situation demeure aussi favorable. En termes généraux, le Comité convenait qu'un tel système devrait donner aux fonctionnaires une idée plus nette de ce que l'on attendait d'eux, indiquer plus clairement aux supérieurs comment juger ou orienter la conduite de leurs employés et inspirer dans le public un plus grand sentiment de confiance. Le Comité proposait un ensemble minimum de règles précises devant s'appliquer, en principe, à tous les titulaires de charges publiques, y compris les personnes nommées par le gouverneur en conseil ainsi que les membres des Forces armées et de la Gendarmerie royale du Canada. Ces règles pourraient également être adoptées pour le personnel des sociétés de la Couronne.

Le Comité relevait dix grandes sources de conflits, qui nous préoccupent encore aujourd'hui, et énoncait le principe général suivant: le titulaire de charge publique, dans l'exercice de ses fonctions, devrait servir l'intérêt public; s'il doit faire un choix entre ses intérêts personnels (ou tout autre intérêt) et ses fonctions publiques, il doit choisir ces dernières. En outre, le Comité déclarait en conclusion:

- il faut un ensemble de règles qui, sans être excessivement détaillées, puissent fournir une orientation valable aux titulaires de charges publiques;

- l'application d'un code portant sur les conflits d'intérêts doit tenir compte de la nature et de l'étendue des responsabilités du titulaire de charge publique en cause ainsi que de ses intérêts privés qui pourraient se trouver en conflit avec l'intérêt public;

- les règles doivent exiger que les titulaires de charges publiques déclarent les conflits réels ou éventuels, avant leur nomination, à l'autorité qui les nomme et après leur nomination, à leur supérieur, de sorte que, si la chose est juste et réalisable, les intérêts personnels puissent être conservés et qu'on puisse prendre une décision officielle quant à la façon dont le conflit aurait été contrôlé ou simplement enregistré.

- le problème des emplois ultérieures ne peut être résolu efficacement par des règles liant uniquement les titulaires de charges publiques. Mais puisqu'il s'agit d'un problème important, le Comité recommande qu'une déclaration gouvernementale soit faite à ce sujet, préférablement à un moment où le dossier ne sera pas d'actualité;

- compte tenu de la rareté des incidents de cette nature, il ne serait pas sage de tenter d'énoncer une règle dépassant les dispositions de la Loi sur l'emploi dans la Fonction publique concernant le droit des fonctionnaires de se livrer à des activités politiques;

- les règles doivent mentionner expressément l'abus de renseignements confidentiels, puisque c'est là une source majeure de conflits d'intérêts.

Le document concluait que le moment était venu pour le gouvernement d'adopter un ensemble de règles sur les conflits d'intérêts dans la fonction publique et qu'il était possible d'élaborer et d'appliquer un code minimal. C'est le Conseil du Trésor qui devrait administrer ce code pour la fonction publique, mais le système devrait s'appliquer au plus grand nombre possible de titulaires de charges publiques.

Comme l'écrivait le professeur Kernaghan:

> En 1972, la publicité vigoureuse accordée par la presse à des cas de présumés conflits d'intérêts impliquant des ministres de l'Ontario et aboutissant à la démission d'un ministre a suscité parmi le public un renouveau d'intérêt à l'égard de l'éthique professionnelle des titulaires de charges publiques. En outre, à l'été de 1972, deux hauts fonctionnaires du ministère de l'Expansion économique régionale ont été suspendus pour avoir présumément " autorisé une subvention d'encouragement à une société dont ils détenaient des actions. "
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> Il était clair d'après la discussion de ces incidents que tant le public que les législateurs souffraient de confusion et de désaccord quant à ce qui constituait des conflits d'intérêts. Il fallait des lignes directrices ou des règles de conduite.[3]

Dans le discours du Trône du 4 janvier 1973, le gouverneur général annonçait que la Chambre serait saisie de propositions portant sur les conflits d'intérêts, en ce qui concerne les députés, les ministres de la Couronne et les

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3 Kenneth Kernaghan, Ibid, p. 8.

fonctionnaires. Le 8 janvier 1973, le gouvernement annonçait en Chambre son intention d'énoncer des règlements dans trois catégories possibles de conflits d'intérêts.

À compter de 1973, on a commencé à s'intéresser davantage aux conflits d'intérêts à l'égard des députés et des sénateurs. Le 7 janvier 1973, M. Stanley Knowles (député de Winnipeg Nord-Centre) présentait en Chambre le projet de loi C-38 portant sur la divulgation des intérêts financiers des sénateurs et des députés. Le projet de loi a été présenté de nouveau à la session suivante sous le numéro C-158 mais n'a pas reçu la seconde lecture. En réponse à une question posée en Chambre, monsieur le Premier ministre, vous avez déclaré le 8 juin 1973 : "Le gouvernement s'efforcera de concilier le désir véritable des Canadiens de voir des gens éminents au service du public, soit comme députés, soit comme fonctionnaires, avec l'important principe qui consiste à éviter les conflits d'intérêts dans le cas où une de ces personnes agirait dans son intérêt tout en étant au service du public."

Le Bureau du Conseil privé a reçu plusieurs autres études et suggestions. On a suggéré un ordre pour traiter des diverses propositions. On a établi une distinction entre les ministres, les députés et les personnes nommées par le gouverneur en conseil d'une part, et les fonctionnaires d'autre part. On disait que le premier groupe avait des responsabilités fiduciaires alors que le dernier était traité dans le cadre d'une relation de maître à serviteur. Cette distinction n'était pas jugée satisfaisante par certains car il était difficile d'en concevoir une application systématique et cohérente ou d'envisager une politique appropriée fondée sur cette distinction.

Comme le mentionne le professeur Kernaghan:

> La plupart des événements racontés jusqu'ici impliquaient des personnes élues et non pas des fonctionnaires. En fait, très peu de manquements à l'éthique professionnelle de la part des fonctionnaires ont été portés à l'attention du public - en partie parce qu'il semble y avoir relativement peu de cas et en partie parce que dans de tels cas les mesures disciplinaires sont prises à l'intérieur de la fonction publique à moins que l'infraction ne soit assez grave pour relever des tribunaux ordinaires. La publicité donnée aux problèmes de conflits d'intérêts impliquant des personnes élues a cependant atteint aussi les fonctionnaires. Une fois qu'on s'inquiète des ministres, il est logique de se préoccuper aussi des sous-ministres qui ont accès à une grande quantité de renseignements confidentiels et dont l'influence est considérable dans l'établissement des politiques. Il

> s'ensuit également qu'il devrait y avoir des lignes directrices pour les autres fonctionnaires qui pourraient faire face, par suite de leurs fonctions, à des problèmes d'éthique professionnelle.[4]

En 1973, le Cabinet avait adopté le principe de base énoncé dans la lettre adressée en 1964 par le Premier ministre Pearson à ses ministres à ce sujet. C'est cet énoncé qui constitue le fondement des lignes directrices actuelles touchant les fonctionnaires, et dont découlent celles touchant les personnes nommées par le gouverneur en conseil. Au milieu de 1973, quatre mémoires sur les conflits d'intérêts ont été étudiés. Ils portaient sur les ministres, les députés, les personnes nommées par le gouverneur en conseil et les fonctionnaires.

En juillet 1973, l'honorable Alan MacEachen, président du Conseil privé, déposait un Livre vert intitulé Les membres du Parlement et les conflits d'intérêts. Le document comprenait un projet de loi sur l'indépendance du Parlement qui devait s'appliquer aux sénateurs et aux députés. Le but de la loi était d'assurer que l'indépendance des parlementaires dans l'exercice de leurs fonctions ne soit pas compromise par leurs intérêts privés. M. MacEachen a déclaré en Chambre que les députés et les sénateurs sont des fiduciaires du public qui doivent s'acquitter de leurs fonctions, et sembler s'en acquitter, d'une façon qui montre leur souci premier est l'intérêt public.

Ce même mois, Monsieur le Premier ministre, vous avez fait une déclaration en Chambre à l'égard des conflits d'intérêts dans laquelle nous précisiez que les ministres devaient démissionner des postes d'administrateurs des sociétés commerciales et de certains autres postes d'administrateurs, et couper tous les liens d'affaires, commerciaux et professionnels pendant la durée de leur mandat. Ils devaient prendre des dispositions à l'égard de leurs placements personnels de façon à prévenir les conflits, et vous avez expliqué les deux options à cet égard, la fiducie en compte bloqué et la fiducie sans droit de regard. C'était déjà, en grande partie, la politique du gouvernement depuis plusieurs années, et l'abandon des postes d'administrateurs et les dispositions à prendre à l'égard des biens avaient été mentionnés dès le mois d'août 1968. Ces règles comme vous le disiez seraient rédigées sous forme de lignes directrices aussitôt que le Parlement aurait eu l'occasion d'étudier le Livre vert.

Le 18 décembre 1973, Monsieur le Premier ministre, en annonçant la politique du gouvernement, vous avez déclaré qu'elle clarifiait pour la fonction publique "les responsabilités qui, sans être nouvelles, ni s'ajouter à celles qu'assument depuis toujours les fonctionnaires" exigent d'être reformulées et officialisées. Vous avez signalé "qu'il est essentiel pour

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4 Ibid.

l'employé, comme pour l'employeur, que les normes qu'on établit soient explicites", et répété que "dans l'établissement de ces normes, il importe non seulement de protéger suffisamment le public, mais également de garantir les droits des principaux intéressés." Vous avez aussi annoncé une autre option dont pourraient se prévaloir les ministres à l'égard de leurs biens,en plus du dessaisissement par vente, ou du recours à une fiducie sans droit de regard ou en compte bloqué. Il s'agissait de la déclaration publique de certains avoirs qui ne risquaient pas de constituer une source de conflit. De plus, d'autres catégories de biens pourraient être considérées comme exemptées.

Vous avez déclaré qu'il y aurait également des lignes de conduite pour les personnes nommées par le gouverneur en conseil et que celles-ci devraient respecter des normes semblables à celles qui s'appliquent aux ministres. Il y aurait un ensemble de normes et de règles applicables aux employés du Parlement, et, dans le cas des employés du Sénat, cette question devrait être renvoyée à la Commission de la régie intérieure. À ce jour, on n'a produit ni normes ni lignes directrices pour ce groupe.

À ce moment, il a été annoncé que les sociétés et organismes de la Couronne seraient encouragées à élaborer des normes et des règles adaptées à chacun et à les appliquer. Peu après, le 28 décembre 1973, vous écriviez à vos ministres pour leur indiquer la marche à suivre en vue d'éviter certaines activités susceptibles d'être source de conflit et pour expliquer le mécanisme de la déclaration publique.

Le 31 décembre 1973, le Secrétaire du Conseil du Trésor écrivait aux sous-ministres pour les informer que les lignes directrices sur les conflits d'intérêts s'appliquaient à la fonction publique et pour souligner qu'il fallait que tous les fonctionnaires s'y conforment. Les ministères étaient encouragés à élaborer les lignes directrices pour les adapter à leur cas particulier. Cette circulaire contenait ce qui semble être la première directive à l'égard du refus de cadeaux susceptibles de jeter un doute sur l'objectivité des fonctionnaires.

En mai et juin 1974, on créait le Bureau du sous-registraire général adjoint pour administrer les directives touchant les ministres, leur personnel soustrait et les personnes nommées par le gouverneur en conseil. Le 8 novembre 1974 marque l'entrée en vigueur des lignes de conduite relatives aux conflits d'intérêts touchant les personnes nommées par le gouverneur en conseil. Ces personnes devaient respecter les dispositions de ces lignes directrices et également, au minimum, les lignes directrices touchant les fonctionnaires. Il a d'abord été décidé d'appliquer ces lignes directrices uniquement à certains hauts fonctionnaires et, par la suite, d'y assujettir graduellement d'autres catégories de personnes nommées par le gouverneur en conseil.

En juin 1975, monsieur le Premier ministre, vous écriviez à tous les lieutenants-gouverneurs pour leur demander de se conformer à trois directives spéciales similaires à celles touchant les personnes nommées par le gouverneur en conseil. En 1978, il a été décidé que les directives s'appliqueraient dorénavant aux hauts-commissaires et aux ambassadeurs et elles ont été par la suite appliquées à tous les chefs de mission. Ces lignes se conduite touchant les personnes nommées par le gouverneur en conseil ne s'appliquent pas aux personnes à temps partiel nommées par le gouverneur en conseil, et il n'a jamais été prévu qu'elles s'y appliqueraient.

Le 27 novembre 1974, le Livre vert était déposé à nouveau pour être renvoyé au Comité permanent des privilèges et des élections. Le 9 avril de l'année suivante, il était redéposé au Sénat. En 1975 et en 1976, le Comité permanent des privilèges et des élections de la Chambre et le Comité permanent du Sénat sur les affaires juridiques et constitutionnelles présentaient leurs rapports sur le Livre vert. Ni l'un ni l'autre n'a fait l'objet d'un débat en Chambre ou au Sénat.

Le 20 novembre 1975, on approuvait des lignes directrices particulières touchant le personnel soustrait des ministres. Elles ont depuis été abrogées et le personnel soustrait est maintenant soumis soit aux lignes directrices touchant les ministres soit à celles qui visent les fonctionnaires. On s'attend normalement à ce que les chefs de cabinet et les conseillers supérieurs en politique soient assujettis aux lignes directrices touchant les ministres; les autres membres du personnel soustrait sont assujettis à l'un ou l'autre des deux régimes, à la discrétion du ministre.

La Loi concernant l'indépendance du Parlement, projet de loi C-62, a été déposée en Chambre le 26 juin 1978 et a reçu la première lecture. Le projet de loi est mort au feuilleton à la fin de la session le 10 octobre 1978. Le 16 octobre, le projet de loi était représenté, avec certaines modifications, sous le numéro C-6 et le titre, Loi concernant l'indépendance du Parlement et les conflits d'intérêts des sénateurs et des députés. Le 8 mars 1979, le projet de loi recevait la seconde lecture et était renvoyé au Comité permanent des privilèges et des élections, mais la fin de la session, le 26 mars 1979, y mettait un terme.

Le 1er août 1979, le Premier ministre Clark présentait de nouvelles lignes directrices sur les conflits d'intérêts à l'intention des ministres. Ces lignes directrices s'écartaient des précédentes sur cinq points principaux:

- Elles s'appliquaient aux conjoints et aux enfants des ministres, aussi bien qu'aux ministres eux-mêmes, de

façon à inclure les avoirs de toute la cellule familiale.

- Les ministres ne pouvaient plus placer leurs avoirs dans une fiducie en "compte bloqué", mécanisme par lequel le bénéficiaire ne peut gérer ses avoirs mais continue d'en connaître la nature.

- Les avoirs qui devaient être vendus ou placés en fiducie sans droit de regard comprenaient les sommes importantes de devises étrangères et des prêts importants à des personnes ne faisant pas partie de la famille du ministre.

- Les règles pour les fiducies sans droit de regard étaient élargies. Les fiduciaires devaient comprendre un fiduciaire désigné par le gouvernement, choisi parmi une liste de sociétés de fiducie reconnues, qui devait être chargé de veiller à ce que le fonctionnement de la fiducie soit conforme aux lignes directrices et qui, à ce titre, devait avoir un vote décisif lors de toute décision prise par les fiduciaires.

- Les cadeaux d'une valeur de plus de $100 reçus par un ministre ou un membre de sa famille d'une personne non liée par des liens parentaux devaient être divulgués dans les 30 jours.

Les règles régissant la conduite des ministres énoncées dans votre lettre du 28 décembre 1973, Monsieur le Premier ministre, étaient classées confidentielles, parce qu'elles étaient considérées comme partie intégrante d'un document du Cabinet. Il semble étrange que les règles exposant comment les ministres doivent se comporter à l'égard des conflits d'intérêts soient demeurées secrètes - surtout étant donné qu'il est bon que le public sache que l'on s'occupe de ces questions d'une façon satisfaisante. Les lignes directrices touchant les ministres ont été rendues publiques le 7 août 1979.

h) Question de l'après-mandat

Bon nombre des premières études menées sur la question des conflits d'intérêts ont signalé que le gouvernement devait étudier la question des activités ultérieures qui pouvaient être source de conflit. Rappelons l'étude de Jeremy Williams, celle d'Yvon Marcoux, le rapport du Comité interministériel sur les conflits d'intérêts (1972) et plusieurs documents du Cabinet.

Un certain nombre de problèmes ont surgi dans ce domaine. En 1975-1976, le Bureau du Conseil privé effectuait une étude portant sur la nécessité d'une politique gouvernementale à l'égard des activités ultérieures des anciens fonctionnaires. On a

examiné les politiques d'autres gouvernements pour constater que les politiques du Royaume-Uni et des États-Unis n'avaient ni la même nature ni la même démarche. On a analysé les problèmes que pouvaient causer les activités des anciens fonctionnaires et l'on a examiné des façons efficaces et équitables de régler cette question. L'étude concluait qu'il était dans l'intérêt du gouvernement, du public et des fonctionnaires d'adopter une politique claire et uniforme à cet égard.

En mars et avril 1976, on s'est inquiété au Parlement et dans la presse des activités commerciales de deux anciens sous-ministres (l'affaire Reisman-Grandy). C'est alors, Monsieur le Premier ministre, que vous avez déclaré à la Chambre des communes que le gouvernement s'inquiétait de certaines pratiques d'anciens fonctionnaires et que la question était à l'étude en vue de produire bientôt des lignes directrices. On a étudié l'adoption de certains principes. Il s'agissait de limiter pour les anciens fonctionnaires la possibilité 1) d'accepter un emploi auprès de sociétés avec lesquelles ils avaient eu une relation officielle, 2) de faire volte face pour représenter ou aider les sociétés commerciales à l'égard de questions dont ils s'occupaient ou qui relevaient de leur compétence alors qu'ils étaient à l'emploi du gouvernement et 3) de faire des pressions ou de donner des conseils concernant les ministères ou organismes du gouvernement où ils étaient employés ou avec lesquels ils avaient d'étroites relations de travail.

On jugeait important que le gouvernement indique clairement au public et aux fonctionnaires les normes auxquelles on s'attendait que les anciens employés de l'État se conforment. C'est pourquoi on voulait que soient formulés des principes précis. L'adoption de principes, dont l'application serait déterminée au besoin par un organisme consultatif, semblait être la façon qui permettait le plus de souplesse quant à l'application de la politique et à sa modification à une date ultérieure. Le 7 octobre 1976, le Cabinet adoptait les principes et la politique.

Vous écriviez à vos ministres le 8 octobre 1976 pour demander qu'ils se conforment, de même que les personnes relevant de leur autorité, à l'esprit de la politique et des lignes directrices jusqu'à ce qu'il soit possible de prendre des mesures pour parachever la mise en oeuvre du programme. Votre lettre comportait les annexes I à V, désignées sous le nom de lignes directrices touchant les emplois ultérieurs à une charge publique et qui ont été déposées en Chambre le 17 décembre 1976. Le 14 février 1977, vous confirmiez que l'annexe IV des lignes directrices, portant sur les dispositions administratives, s'appliquerait dorénavant aux membres des Forces armées et de la Gendarmerie royale du Canada.

Le 29 décembre 1977, les mi stres étaient informés que les lignes directrices sur les emplois ultérieurs à une charge publique entreraient en vigueur le 1er janvier 1978. Elles s'appliquaient aux ministres, au personnel soustrait des ministres, aux secrétaires parlementaires, aux personnes nommées par le gouverneur en conseil et aux fonctionnaires du niveau SX-1 et des niveaux supérieurs. Les lignes directrices n'étaient pas rétroactives et ne s'appliquaient donc pas aux ministres déjà en fonction, mais on demandait à tous de se faire un point d'honneur de continuer à s'y conformer de leur plein gré. La version de 1976 des lignes directrices portait qu'elles devaient être une "condition d'emploi", mais la version de 1977 parle de "se faire un point d'honneur de se conformer de leur plein gré". Un certain nombre de ministres de ce gouvernement, parce qu'ils avaient été nommés avant cette date, n'ont pas été tenus de se conformer aux lignes directrices avant d'être nommés à nouveau ministres, deux élections plus tard. Des lignes directrices modifiées sur les emplois ultérieurs à une charge publique ont été déposées à la Chambre le 24 avril 1978. Cette version modifiée est présentement en usage pour les fonctionnaires et les personnes nommées par le gouverneur en conseil.

Certaines modifications aux lignes directrices sur les emplois ultérieurs ont été distribuées le 1er août 1979 aux ministres du Cabinet, établissant ainsi un régime expressément pour eux et les soustrayant aux lignes directrices universelles sur les emplois ultérieurs à une charge publique. Ces lignes directrices ont été adoptées le 28 avril 1980 par le nouveau gouvernement du Premier ministre Trudeau, avec quelques modifications de style. Elles ont été distribuées à tous les ministres le 28 avril 1980 et déposées en Chambre le 1er mai 1980.

En même temps, les lignes directrices sur les emplois ultérieurs à l'intention des ministres ont été modifiées pour s'appliquer aux secrétaires parlementaires. Malgré quelques modifications textuelles et la réduction des périodes de transition, la substance demeurait la même. Les secrétaires parlementaires étaient déjà assujettis aux lignes directrices universelles, mais on les a avisés, le 29 avril 1980, qu'ils devraient observer les lignes directrices conçues expressément à leur intention, dont copie était annexée à chaque lettre.

Le 30 avril 1980, vous avez informé les ministres que certains membres désignés de leur personnel soustrait (au moins les chefs de cabinet et les conseillers supérieurs) seraient dorénavant assujettis aux lignes directrices touchant les ministres.

En résumé, trois séries de lignes directrices sur les emplois ultérieurs sont présentement en usage:

(1) Les lignes directrices sur les emplois ultérieurs (applicables aux fonctionnaires et aux personnes nommées par le gouverneur en conseil).

(2) Les lignes directrices sur les emplois ultérieurs à l'intention des secrétaires parlementaires (applicables aux secrétaires parlementaires).

(3) Les lignes directrices sur les emplois ultérieurs à l'intention des ministres (applicables aux ministres et aux membres désignés du personnel soustrait des ministres).

i) Les années 1980: raffinement des lignes directrices et révision majeure de la politique

Les lignes directrices à l'intention des ministres concernant les conflits d'intérêts et les emplois ultérieurs sont la prérogative du Premier ministre et sont susceptibles d'être modifiées lorsqu'il y a changement de gouvernement. Des modifications ont été apportées par le gouvernement de Joseph Clark, et de nouvelles l'ont été par vous, Monsieur le Premier ministre, en 1980. Les lignes directrices à l'intention des ministres ont été modifiées à trois égards:

- La clause concernant les conjoints et les enfants à charge a été retirée; cependant, les ministres ne doivent pas transférer leurs biens à leur conjoint ou à leurs enfants à charge pour se soustraire aux exigences des lignes directrices.

- On introduisait pour la première fois les sociétés de portefeuille en fiducie qui protègeaient le droit du ministre à la suite d'autres dispositions prises à des fins de planification testamentaire. Tous les revenus devaient être remis dans le fonds.

- D'autres dispositions étaient ajoutées quant aux soins à prendre à l'égard des questions de conflits d'intérêts.

Les nouvelles lignes directrices, datées du 28 avril 1980, ont été déposées en Chambre et ont fait l'objet d'un communiqué de presse le 1er mai 1980. Ce même jour, on demandait aux ministres, aux secrétaires parlementaires et au personnel soustrait des ministres de s'y conformer.

À la fin de 1981, le Secrétaire du Conseil du Trésor a entrepris une revue de l'expérience des ministères et organismes à l'égard de l'application et de l'administration des lignes directrices sur les conflits d'intérêts et sur les emplois ultérieurs. L'étude a confirmé qu'il existait des variations

considérables d'un ministère à l'autre; le rapport recommandait des façons d'assurer une certaine uniformité. On a également pris acte des préoccupations exprimées par certaines personnes à l'égard de la politique et des lignes directrices sur les emplois ultérieurs.

En février 1982, le Conseil du Trésor convenait que les frais annuels de constitution et de maintien des comptes de fiducie, pour se conformer aux lignes directrices, seraient payés par le gouvernement, jusqu'à concurrence de la moitié de 1 % de la valeur marchande des biens administrés pour une personne donnée.

Le 30 mars 1983, l'honorable Walter Baker déposait le projet de loi C-679 sur les normes de conduite des titulaires de charges publiques et le 29 novembre 1983, M. Howard Crosby, député de Halifax-Ouest, présentait le projet de loi C-700 sur le contrôle des conflits d'intérêts dans les affaires gouvernementales. Ce projet était déposé à nouveau le 19 décembre 1983 sous le numéro C-208. Ces projets de loi émanant de simples députés illustrent l'intérêt que portent les parlementaires à la politique et aux méthodes régissant les conflits d'intérêts.

Présentement, il existe trois ensembles de lignes directrices concernant les conflits d'intérêts.

1- Les lignes directrices à l'intention des fonctionnaires (applicables aux fonctionnaires, aux personnes nommées par le gouverneur en conseil et à certains membres du personnel soustrait des ministres).

2- Les lignes de conduite à l'intention des personnes nommées par le gouverneur en conseil (applicables aux personnes nommées à plein temps par le gouverneur en conseil [au palier SX-1 et aux paliers supérieurs]).

3- Les lignes directrices à l'intention des ministres (applicables aux ministres et aux membres désignés de leur personnel soustrait).

Il y a également les principes fondamentaux auxquels on s'attend que les secrétaires parlementaires se conforment, qui sont exposés dans une lettre mais non sous forme de lignes directrices. Les règles qui s'appliquent aux lieutenants-gouverneurs sont formulées dans un échange de lettres.

Enfin, le 7 juillet 1983, vous constituiez le Groupe de travail sur les conflits d'intérêts pour réaliser une étude majeure de toutes ces politiques et méthodes, et vous nous chargiez d'étudier si de nouvelles démarches s'imposaient à ce moment de notre histoire.

CHAPITRE 8

RÉSUMÉ DE LA LÉGISLATION, DES LIGNES DIRECTRICES ET DE LA POLITIQUE DU GOUVERNEMENT FÉDÉRAL EN MATIÈRE DE CONFLITS D'INTÉRÊTS

Le résumé suivant de la législation, des lignes directrices et de la politique en vigueur au niveau fédéral en matière de conflits d'intérêts facilitera la compréhension des commentaires et des recommandations présentés dans le présent rapport. On trouvera à l'annexe C ou D le texte intégral des lois, lignes directrices et politiques auxquelles il est fait allusion dans le présent chapitre.

a) Dispositions du Code criminel

1. Article 108 - Corruption

L'article 108 du Code criminel stipule que toute personne qui occupe une charge judiciaire, est membre du Parlement du Canada ou d'une législature et qui accepte ou obtient, convient d'accepter ou tente d'obtenir de l'argent ou tout traitement de faveur pour lui-même ou pour une autre personne par corruption commet une infraction et est passible d'un emprisonnement allant jusqu'à quatorze ans. Il en est de même de celui qui donne ou offre, par corruption, à une personne qui occupe une charge judiciaire ou qui est membre du Parlement ou d'une législature de l'argent ou tout autre traitement de faveur.

2. Article 110 - Fraudes envers le gouvernement (cadeaux)

L'article 110 du Code criminel interdit à quiconque de donner ou d'accepter un pot-de-vin concernant la conclusion d'affaires ayant trait au gouvernement. En outre, il est interdit aux fonctionnaires et aux employés du gouvernement d'exiger ou d'accepter des cadeaux de toute personne qui a des relations d'affaires avec le gouvernement (à moins d'avoir obtenu au préalable le consentement écrit du chef de la division gouvernementale qui l'emploie ou dont il est un fonctionnaire). Une telle infraction entraîne une peine d'emprisonnement allant jusqu'à cinq ans.

3. Article 297 - Refus de remettre des biens

Quiconque est chargé de la garde temporaire de biens gouvernementaux et refuse de les remettre sur demande commet une infraction et est passible d'un emprisonnement de 14 ans, aux termes de l'article 297 du Code criminel.

4. Article 357 - Faux relevé fourni par un fonctionnaire public

Est passible d'un emprisonnement de cinq ans, quiconque, étant autorisé à s'occuper des revenus publics, fournit sciemment un faux état ou relevé.

5. Article 682 - Incapacité de s'engager par contrat - Disparition de l'incapacité

L'article 682 stipule que toute personne déclarée coupable en vertu de l'article 110 n'a plus qualité pour passer un contrat avec le gouvernement jusqu'à ce qu'elle obtienne une dispense du gouverneur en conseil ou l'annulation de sa peine.

b) Infractions criminelles prévues dans les autres lois

Un certain nombre de lois régissant l'activité gouvernementale contiennent des clauses spécifiques d'interdiction. Certaines précisent la peine à imposer à ceux qui dérogent aux dispositions de la loi, notamment: la Loi sur l'immigration, la Loi sur l'administration financière, la Loi sur l'assurance-chômage et la Loi de l'impôt sur le revenu.

1. Loi sur l'immigration

Un agent d'immigration ou un arbitre qui fait de fausses déclarations, reçoit ou accepte de recevoir un pot-de-vin, enfreint les dispositions de la Loi sur l'immigration, incite ou encourage délibérément une autre personne à les enfreindre est passible, sur déclaration de culpabilité, d'une forte amende et d'une peine d'emprisonnement. C'est aussi le cas de toute personne qui empêche un agent d'immigration ou un arbitre d'exercer ses fonctions, ou qui se fait passer pour un agent d'immigration ou un arbitre. En outre, toute personne qui enfreint la loi commet une infraction qui peut entraîner une peine.

2. Loi sur l'administration financière

Est passible d'amende ou d'emprisonnement toute personne dont l'emploi se rattache à la perception de deniers publics et qui reçoit indûment une somme d'argent, qui conspire dans l'intention de frauder Sa Majesté, qui permet à dessein une contravention à la loi, qui altère un certificat, un rapport ou

une inscription dans un livre, et qui s'abstient de signaler une violation évidente à une loi de revenu, qui exige ou accepte une somme d'argent ou autre chose de valeur comme paiement, en violation de la loi. Est aussi coupable d'une infraction quiconque offre ou donne un présent à une personne qui occupe une charge se rattachant aux deniers publics, ou qui accepte ou reçoit un tel présent.

3. Loi sur l'assurance-chômage - Partie V

Les renseignements obtenus en vertu de la Loi sur l'assurance-chômage sont confidentiels et ne peuvent être divulgués sauf pour se conformer aux dispositions d'application ou d'interprétation de ladite Loi. Toute personne qui déroge aux dispositions de la loi commet une infraction passible d'amende, d'emprisonnement ou des deux peines.

4. Loi de l'impôt sur le revenu - Partie XV

Nul ne peut, sans y être autorisé, communiquer des renseignements ou permettre l'accès à des renseignements obtenus en vertu de la Loi de l'impôt sur le revenu. Toute violation de ces dispositions est une infraction punissable d'amende, d'emprisonnement, ou des deux peines, conformément au paragraphe 241(9).

c) Responsabilité civile en vertu de certaines lois

D'autres lois de nature semblable prévoient des peines au civil plutôt qu'au criminel. Par exemple, aux termes de la Loi sur l'administration financière, Partie XI, un employé peut dans certains cas être tenu de rendre dûment compte des deniers publics ou être tenu responsable financièrement des sommes mal gérées.

d) Activités interdites en vertu de certaines lois

D'autres lois qui régissent le fonctionnement du gouvernement fédéral et l'activité de ceux qui sont à son emploi énoncent des règles relatives aux conflits d'intérêts. La Loi sur l'Office national de l'énergie, par exemple, contient des dispositions interdisant aux membres de l'Office de conserver des intérêts dans une société qui fait commerce de l'énergie et tout autre investissement qui pourrait entrer en conflit avec l'exercice de sa charge.

e) Dispositions sur les conflits d'intérêts des parlementaires

Les députés sont assujettis aux règles qui régissent les conflits d'intérêts et figurent dans la Loi sur la Chambre des communes, la Loi sur le Sénat et la Chambre des communes, le Règlement de la Chambre des communes, le Code criminel, la Loi sur les élections, le Règlement du Sénat, et les lois et pratiques

du Parlement du Royaume-Uni dont il est fait mention à l'article 18 de l'Acte de l'Amérique du Nord britannique.

Il est interdit aux députés d'accepter un pot-de-vin ou des honoraires; ils n'ont pas non plus le droit d'exercer des fonctions incompatibles avec leur charge à la Chambre des communes (comme le fait d'avoir un bureau personnel ou un emploi rémunéré dans un autre secteur gouvernemental, ou un poste de législateur provincial, de shérif, de greffier de la paix, de registraire des titres ou de procureur de la Couronne pour un comté).

À quelques exceptions près, les députés et les sénateurs ne doivent pas être partie à un contrat gouvernemental leur permettant de toucher une rémunération à même les deniers publics. On considère que certains intérêts financiers des députés et des sénateurs sont incompatibles avec une charge publique et, pour ce motif, les parlementaires ne sont pas autorisés à voter sur les questions dans lesquelles ils ont un intérêt pécuniaire.

f) Dispositions de la Loi sur l'emploi dans la Fonction publique

L'article 32 de la Loi sur l'emploi dans la Fonction publique délimite les activités politiques permises. Ainsi, il est interdit à un sous-chef ou, sauf dans les cas où l'article l'autorise, à un employé de travailler pour ou contre un candidat à une élection à la Chambre des communes, à une législature provinciale ou au conseil des territoires, ou de travailler pour ou contre un parti politique. Il est cependant permis d'assister à une réunion politique ou de verser à titre de contribution de l'argent pour la caisse d'un candidat ou d'un parti politique.

g) Dispositions de la Loi sur les relations de travail dans la Fonction publique

La Loi sur les relations de travail dans la Fonction publique contient certaines interdictions concernant la participation de personnes qui exercent des fonctions confidentielles ou de gestion aux activités des associations d'employés, ou leur immiscion dans ces activités, et concernant d'autres actions de ces personnes. En règle générale, nul ne peut refuser d'employer une personne ni faire preuve de discrimination à son égard parce qu'elle appartient à une association d'employés. Il est aussi interdit de tenter de dissuader un employé d'adhérer à une association d'employés. Les associations professionnelles, pour leur part, n'ont pas le droit de tenir des réunions d'adhésion dans les locaux de l'employeur pendant les heures de travail.

h) Lignes directrices à l'intention des ministres de la Couronne

Ces lignes directrices concernant les conflits d'intérêts s'appliquent aux ministres de la Couronne et, à leur discrétion, à ceux des membres de leur personnel qui sont soustraits aux dispositions de la Loi sur l'emploi dans la Fonction publique (personnel soustrait). Elles s'appliquent à tout le moins au chef de cabinet et aux principaux conseillers politiques du ministre. Les lignes directrices ministérielles concernant l'emploi ultérieur y sont jointes.

Les principes fondamentaux des lignes directrices à l'intention des ministres sont les suivants: il appartient à chacun d'éviter les conflits d'intérêts; les ministres doivent prendre les dispositions voulues pour que leurs intérêts personnels soient compatibles avec l'intérêt public; ils ne doivent pas profiter ou sembler profiter de leur charge ou de l'information obtenue au cours de leur mandat si celle-ci n'est pas accessible au public.

Dès sa désignation ou peu de temps après sa nomination, un ministre doit cesser d'exercer sa profession, de diriger une entreprise, d'exercer des activités commerciales, et d'administrer des biens réglementés ou non exemptés; il ne doit pas donner des avis rémunérés à titre d'expert, ni accepter de devenir membre de conseils d'administration, ni le demeurer, ni exercer d'autres fonctions pour le compte de sociétés commerciales (même si une certaine souplesse est permise à l'égard d'organisations philanthropiques); un ministre ne doit pas non plus être membre actif d'un syndicat ni d'une association professionnelle.

Les lignes directrices recommandent aux ministres de s'abstenir de privilégier les parents et amis et d'éviter toute situation qui les oblige à accorder des faveurs. Ils sont tenus en outre de consigner au Registre public tout don ou autre avantage d'une valeur supérieure à 200 dollars, à l'exception des cadeaux personnels et officiels de gouvernements, et de l'hospitalité de ceux-ci.

Les biens personnels d'un ministre sont de trois ordres: les biens exemptés (ou non assujettis aux dispositions habituelles), les biens pouvant être divulgués, et les biens réglementés ou non exemptés.

Au nombre des "biens exemptés", notons: les domiciles principaux et secondaires réservés à l'usage personnel, présent ou futur, des ministres et de leur famille, les effets personnels et articles de ménage, véhicules automobiles, bateaux et autres moyens de transport personnel, objets d'art, liquidités et dépôts (à l'exclusion des espèces et des dépôts en devises étrangères servant à des fins de placement ou de spéculation), les obli-

gations d'épargne du Canada et des provinces, les régimes enregistrés d'épargne-retraite qui ne sont pas autogérés, les régimes d'épargne-retraite autogérés comportant uniquement des biens exemptés, les régimes d'épargne-logement, les placements dans une société de fonds mutuel à capital variable, les certificats de placements garantis et autres instruments financiers semblables, les rentes à versements invariables ou autres, les droits courus à la pension de retraite, les polices d'assurance-vie, les sommes à recevoir d'un ancien employeur, client ou accocié, et les prêts personnels de moins de 5 000 dollars consentis à toute personne liée de quelque façon avec le ministre.

Il n'est pas nécessaire de divulguer les biens précités. En règle générale, ils servent à des fins personnelles et ne sont pas frappés de restrictions.

Les "biens pouvant être divulgués" ne risquent pas de donner lieu à des conflits d'intérêts et ils peuvent être consignés dans le Registre public. Font partie de ces biens: les intérêts détenus dans une entreprise familiale ou autre entreprise locale dont les actions ne sont pas cotées en bourse et qui ne concluent pas de marchés avec l'État ni ne contrôlent les actions de sociétés publiques; les propriétés d'exploitation agricole, les biens immobiliers autres que les biens exemptés, et la propriété réelle des biens en fiducie autres que les biens en fiducie sans droit de regard.

Les biens qui ne font pas partie des biens exemptés ni de ceux pouvant être divulgués sont considérés comme étant "réglementés" ou non exemptés. Les biens pouvant être divulgués mais qui ne l'ont pas été effectivement sont réputés être réglementés. Ces biens doivent être soit vendus, soit placés en fiducie sans droit de regard et sans qu'il y ait lien de dépendance entre le fiduciaire et le propriétaire des biens. Au nombre des biens réglementés on compte: les titres cotés à la bourse de sociétés et de gouvernements; les intérêts dans des sociétés en nom collectif, entreprises individuelles, coentreprises, sociétés privées et entreprises familiales qui ne sont pas des biens pouvant être divulgués; les options d'achat d'actions (à l'exception de celles des compagnies privées comprises dans les "biens pouvant être divulgués"); les régimes d'épargne-retraite enregistrés autogérés, à l'exclusion de ceux qui comportent uniquement des biens exemptés; les biens immobiliers qui ne sont ni exemptés ni susceptibles d'être divulgués; les biens, métaux compris, et les devises étrangères servant à des fins spéculatives ou d'investissement; les intérêts dans des régimes de participation aux bénéfices; et les prêts excédant 5 000 dollars à des personnes n'ayant aucun lien de filiation, de mariage ou d'adoption avec le ministre.

La procédure à suivre pour l'établissement d'une fiducie et la nomination d'un fiduciaire est rigoureuse, et précise ce qu'il convient de faire et d'éviter.

Un ministre qui a constitué une société de portefeuille aux fins de succession peut mettre ses biens en fiducie en attendant leur restitution.

Lorsqu'un ministre est exécuteur ou fiduciaire d'une succession, il est tenu d'en informer le Premier ministre et de prendre les dispositions voulues pour éviter tout conflit d'intérêts.

Même si le conjoint et les enfants à charge d'un ministre ne sont pas tenus d'observer les lignes directrices, les ministres sont priés de veiller à ce que les intérêts des autres membres de la famille ne suscitent pas de conflit d'intérêts.

Les lignes directrices précisent les dispositions administratives à prendre. Elles rappellent aux ministres qu'ils sont également assujettis à la Loi sur le Sénat et la Chambre des communes.

Les lignes directrices à l'intention des ministres portant sur les emplois ultérieurs à une charge publique leur rappellent qu'ils ne doivent pas se laisser influencer, pendant leur mandat, par les perspectives d'emploi. Si un ministre reçoit une offre d'emploi, il doit en informer le Premier ministre avant d'accepter le poste, surtout s'il y a risque de conflits d'intérêts. En outre, lorsqu'il est à la recherche d'un emploi, un ministre doit veiller à ce qu'il n'y ait aucun conflit d'intérêts réel ou apparent. Au terme de son mandat, un ministre doit se comporter de manière à éviter de donner prise à toute allégation de trafic d'influence, d'octroi de passe-droits ou de traitements de faveur.

Pendant une période de deux ans après l'expiration de son mandat, un ministre doit s'abstenir de devenir membre du conseil d'administration d'une société qui a eu des rapports particuliers avec le ministère ou l'organisme dont il avait la charge, de faire volte-face et de travailler pour une société dans un domaine d'activité intéressant le gouvernement, et dont il a eu à s'occuper personnellement pour le compte du gouvernement, ou de représenter un groupe d'intérêts auprès du ministère ou de l'organisme dont il a eu la charge.

Durant l'année qui suit la fin de son mandat, un ex-ministre doit s'abstenir de travailler pour une société avec laquelle il a fait directement affaires à titre officiel, de représenter la partie adverse concernant toute activité qui relevait antérieurement de sa compétence, ou de donner des avis à des fins commerciales concernant les politiques ou programmes qui relevaient de sa compétence ou dont il s'occupait étroitement.

i) Directives à l'intention des secrétaires parlementaires

Aucune ligne de conduite n'a été publiée expressément pour les secrétaires parlementaires. Suite à leur nomination, le Premier ministre les informe par écrit des normes de conduite à observer et des activités à éviter. Ils sont priés d'examiner continuellement les responsabilités qui leur ont été confiées, et de veiller à ce qu'il n'y ait aucun risque réel ou apparent de conflit d'intérêts. Ils sont priés de demander avis à leur ministre concernant toute précision utile.

En ce qui concerne les emplois au terme de leur mandat, les secrétaires parlementaires sont tenus de se conformer à des exigences semblables à celles qui sont imposées aux ministres, sauf que les périodes de transition sont d'un an et de six mois respectivement. Enfin, il est rappelé aux secrétaires parlementaires qu'ils ont l'obligation d'observer les dispositions de la Loi sur le Sénat et la Chambre des communes.

j) Politique régissant le personnel soustrait des ministres

Un ministre peut, à sa discrétion, désigner les membres de son personnel qui seront assujettis aux mêmes lignes directrices que lui. Il désigne au moins son chef de cabinet et ses principaux conseillers politiques mais, dans certains cas, il peut désigner tous les membres de son cabinet. Ceux qui ne sont pas expressément désignés sont automatiquement assujettis aux lignes directrice applicables aux fonctionnaires. Pour ce qui est des normes à observer en matière d'emploi au terme de leur mandat, les employés soustraits qui occupent un poste d'un rang équivalent à celui de sous-chef sont assujettis aux mêmes lignes directrices que leur ministre; ceux qui occupent un poste de rang supérieur à EX-1 ou équivalent doivent observer les mêmes lignes de conduite que les secrétaires parlementaires et les fonctionnaires d'un rang équivalent.

k) Lignes de conduite applicables aux personnes nommées par le gouverneur en conseil

Les lignes de conduite applicables à ce groupe visent ceux qui occupent un poste d'un niveau EX-1 ou équivalent, ou d'un niveau supérieur. Ces lignes de conduite n'ont pas été appliquées systématiquement aux titulaires à temps partiel nommées par le gouverneur en conseil ni aux membres des organismes judiciaires ou quasi judiciaires, à moins d'une demande spéciale.

Les personnes nommées par le gouverneur en conseil sont tenues d'observer non seulement les lignes de conduite à leur intention, mais aussi celles qui s'appliquent aux fonctionnaires.

Pendant la durée de leur mandat, les personnes nommées par le gouverneur en conseil ne sont pas autorisées à exercer une

profession, à gérer ou exploiter une entreprise ni à devenir ou demeurer membre du conseil d'administration de sociétés. Une certaine latitude est permise en ce qui concerne les organismes philanthropiques.

Comme c'est le cas pour les ministres, les biens des personnes nommées par le gouverneur en conseil sont de trois ordres: biens exemptés, biens pouvant être divulgués et biens réglementés ou non exemptés. Voici quelques exemples des premiers: la ou les résidences occupées par un titulaire, y compris une résidence d'été ou d'hiver ou une ferme; les effets personnels, les effets et autres biens d'utilité courante ou de plaisance; les automobiles, bateaux, motoneiges et autres modes de transport personnel ou familial, y compris un avion privé; les liquidités, dont les comptes de chèques et d'épargne, les obligations d'épargne du Canada, les titres émis par les trois niveaux de gouvernement ou des organismes gouvernementaux; les régimes d'épargne-retraite enregistrés, les placements dans les fonds mutuels aux fins de produire un revenu de retraite; et les créances.

Les biens pouvant être divulgués, qui peuvent faire l'objet d'une déclaration publique, comprennent les intérêts locatifs, les biens immobiliers, les sociétés privées, les titres ou les actions qui ne sont pas cotés en bourse, et d'autres biens dont la valeur ne peut fluctuer en fonction des décisions gouvernementales.

Les biens qui ne font pas partie des catégories "exemptés" et "pouvant être divulgués" sont considérés comme étant non exemptés ou réglementés, et leur propriétaire doit s'en dessaisir soit en les vendant, soit en les mettant en fiducie en compte bloqué ou en fiducie sans droit de regard. Les lignes de conduite donnent des précisions quant à l'établissement et à l'administration d'une fiducie et le choix des fiduciaires.

Le conjoint et les enfants à charge n'étant pas visés par les lignes de conduite, il est conseillé aux personnes nommées par le gouverneur en conseil de veiller à ce que les intérêts des membres de leur famille ne risquent pas de susciter des conflits d'intérêts. Il leur est rappelé en outre que toute violation des lignes de conduite risque d'entraîner des sanctions, dont la révocation de leur mandat.

Les personnes nommées par le gouverneur en conseil sont assujetties aux lignes directrices des titulaires de charges publiques pour ce qui est des emplois au terme de leur mandat (voir la section n) du présent chapitre).

l) Politique régissant les personnes nommées par le gouverneur en conseil à des postes à temps partiel

Lorsque la publication de lignes directrices concernant les conflits d'intérêts a été annoncée à la Chambre des communes en 1973, on a indiqué qu'elles allaient s'appliquer entre autres aux personnes nommées par le gouverneur en conseil à des postes à plein temps. Aucune ligne directrice n'a cependant été publiée à l'intention des personnes nommées par le gouverneur en conseil à des postes à temps partiel.

Ces personnes sont néanmoins assujetties à certaines exigences précises, dont la loi habilitante de l'organisme à laquelle elles sont nommées, les règlements et directives dudit organisme, les lois d'application générale, comme la Loi sur les corporations commerciales canadiennes, qui pourraient s'appliquer à l'organisme, et le Code criminel. Elles peuvent également s'imposer d'autres obligations dont celle d'observer les lignes de conduite des personnes nommées par le gouverneur en conseil.

Le gouvernement essaie de faire en sorte que les titulaires de charges publiques s'acquittent de leurs fonctions et devoirs conformément à des normes de conduite acceptables, et il a pour politique générale d'inciter les organismes qui emploient les personnes nommées par le gouverneur en conseil à des postes à temps partiel d'élaborer leurs propres règles et d'établir des pratiques adaptées à leur situation particulière, tout en respectant l'esprit des lignes directrices actuelles.

Il reste que le gouvernement s'intéresse particulièrement aux postes à temps partiel dotés par le gouverneur en conseil dont les titulaires assument des responsabilités et exercent des pouvoirs et une influence comparables à ceux de leurs collègues à temps plein. En pareils cas, la personne nommée à un poste à temps partiel est généralement priée de déclarer à son supérieur hiérarchique l'ensemble de ses intérêts et engagements. Elle peut aussi consulter avec profit la législation en vertu de laquelle elle a été nommée pour ce qui est de la façon dont elle peut organiser ses affaires personnelles afin d'éviter les conflits d'intérêts; elle peut aussi se reporter aux lignes directrices à l'intention des personnes nommées par le gouverneur en conseil.

m) Directives à l'intention des lieutenants-gouverneurs

Les lieutenants-gouverneurs sont nommés par le gouverneur en conseil et, en principe, ils devraient être assujettis aux lignes de conduite pertinentes. Toutefois, la politique à leur endroit est quelque peu différente. Depuis 1975, on demande au lieutenant-gouverneur désigné d'éviter d'exercer certaines fonctions et activités.

Suite à la nomination d'un lieutenant-gouverneur, le sous-registraire général adjoint communique avec lui et l'informe qu'il est tenu de respecter trois grands principes régissant les conflits d'intérêts: il ne doit pas devenir ou demeurer membre du conseil d'administration d'une société à but lucratif, ni pratiquer une profession, ni s'occuper activement de la gestion d'une entreprise. Il est aussi prié de chercher à éviter tout conflit d'intérêts.

n) Lignes directrices à l'intention des fonctionnaires

Les lignes directrices au sujet des conflits d'intérêts touchant les fonctionnaires s'appliquent sans exception aux fonctionnaires, aux personnes nommées par le gouverneur en conseil à des postes à temps plein (comme il est indiqué à la section k) du présent chapitre) et aux membres du personnel soustrait d'un ministre qui ne sont pas assujettis aux lignes directrices des ministres.

Ces lignes directrices énoncent sept règles que l'on peut résumer comme suit: un fonctionnaire 1) doit avoir une conduite irréprochable qui résiste à l'enquête la plus minutieuse. Il doit faire en sorte de ne pas être redevable à qui que ce soit qui puisse obtenir ou s'attendre d'obtenir un traitement de faveur ni avoir d'intérêt pécuniaire susceptible d'entrer en conflit avec l'exercice de ses fonctions officielles; 2) ne doit pas se placer dans une situation ou il peut y avoir conflit réel ou apparent entre ses intérêts privés et ses fonctions officielles. Dès sa nomination, il doit prendre les dispositions voulues pour éviter tout conflit d'intérêts; 3) doit veiller à ne pas tirer parti ni sembler se servir à son avantage de renseignements obtenus dans l'exercice de ses fonctions officielles et qui ne sont pas accessibles au public; 4) ne doit pas se mettre dans une situation où il pourrait profiter directement ou indirectement de marchés de l'État; 5) doit divulguer à son supérieur hiérarchique tous ses intérêts financiers, commerciaux et d'affaires qui pourraient susciter des conflits d'intérêts; 6) ne doit occuper aucun poste ni emploi extérieur dont les exigences pourraient être inconciliables avec ses fonctions officielles; 7) doit s'abstenir de favoriser ses parents et amis et les organismes dans lesquels il a, ou ses parents et amis ont, des intérêts financiers ou autres.

En outre, les fonctionnaires sont assujettis à des lignes directrices sur les activités après la cessation d'emploi, lesquelles comportent un énoncé de principes et cinq appendices. L'énoncé précise que les lignes directrices visent à éclairer les employés quant aux activités qu'ils peuvent exercer tant au cours de leur mandat au service de l'État que lorsque celui-ci prend fin.

L'appendice I, "Principes régissant la conduite des titulaires de charges publiques" exige de toute personne occupant ou ayant occupé une charge publique qu'elle se comporte de façon que personne ne puisse la soupçonner de favoritisme envers qui que ce soit, ni d'accès privilégié auprès du personnel et des services gouvernementaux, et qu'elle veille à ne pas tirer profit, ni paraître tirer profit de renseignements confidentiels.

L'appendice II, "Lignes directrices à l'intention des titulaires de charges publiques pendant la durée de leur emploi" précise qu'un agent de l'État doit faire part à son supérieur de toute offre d'emploi qui risque de le placer dans une situation de conflit d'intérêts, soit une offre d'emploi qu'il envisage sérieusement d'accepter et d[illegible]ne d'un organisme du secteur privé avec lequel il entretie[illegible]s rapports officiels, soit une offre d'emploi qu'il a déjà acceptée. Un agent de l'État a pour instruction de veiller, lorsqu'il est à la recherche d'un emploi ou s'apprête à occuper de nouvelles fonctions à l'extérieur, à ne pas susciter de conflits d'intérêts et à ne pas entreprendre de négociations commerciales avec d'autres employés gouvernementaux sans y avoir été autorisé au préalable. Après avoir quitté le service de l'État, l'agent doit veiller à ne pas donner l'impression d'user indûment de son influence, ni de bénéficier d'un passe-droit ou d'un traitement de faveur.

L'appendice III "Lignes directrices concernant les activités commeciales d'anciens titulaires de charges publiques" précise les genres d'activités qu'un ancien titulaire de charge publique doit s'abstenir d'exercer au cours de la période qui suit immédiatement la fin de son mandat. Au cours de la période pertinente, le titulaire doit s'abstenir notamment d'accepter un siège au conseil d'administration d'une société qui entretenait des rapports particuliers avec le ministère ou l'organisme pour lequel il a travaillé; de faire volte-face et de représenter une société dans une affaire où le gouvernement du Canada est partie et dont il a eu lui-même l'occasion de s'occuper directement; de représenter des groupes d'intérêts auprès d'un ministère ou organisme qui l'employait ou avec lequel il entretenait des rapports officiels directs. La période de transition pour ce genre d'activités est de deux ans pour les ministres, sous-ministres, chefs d'organismes et membres du personnel soustrait d'un ministre au niveau de sous-chef. Elle est d'une année pour les secrétaires parlementaires, les personnes nommées par le gouverneur en conseil à des postes à temps plein, les membres du personnel soustrait des ministres, les fonctionnaires occupant un poste au niveau EX-1 ou supérieur.

Au cours d'une autre période de transition, qui est d'un an pour le premier groupe et de six mois pour le deuxième, un ex-titulaire de charge publique doit s'abstenir: d'accepter un emploi d'une société avec laquelle il a eu directement des rapports officiels, de représenter la partie adverse dans une

affaire qui relevait de sa compétence, de donner des avis à des fins commerciales concernant les programmes ou politiques du ministère ou de l'organisme qui l'employait ou avec lequel il avait des rapports étroits.

L'appendice IV "Dispositions réglementaires" précise l'objet et la composition des comités chargés de déterminer les modalités d'application des lignes directrices concernant les emplois ultérieurs à une charge publique. Les comités sont habilités à recommander des dispenses d'observation des lignes directrices. Trois comités consultatifs ont été constitués, le premier pour les ministres et les secrétaires parlementaires, le deuxième pour les personnes nommées par le gouverneur en conseil et les membres du personnel soustrait des ministres, et le troisième pour les fonctionnaires.

L'appendice V "Lignes de conduite concernant l'embauchage d'anciens fonctionnaires par le gouvernement" énonce deux règles fondamentales: ne peut occuper certains postes gouvernementaux toute personne qui représente un groupe d'intérêts ou agit comme expert-conseil à des fins commerciales concernant l'activité gouvernementale; l'octroi d'un contrat de 2 000 dollars ou plus à un ex-titulaire nommé par le gouverneur en conseil ou à un ex-fonctionnaire qui touche une pension de retraite du gouvernement est subordonné à l'approbation préalable du ministre intéressé ou du Conseil du Trésor, selon le cas.

o) Lignes directrices complémentaires des ministères, conseils, commissions et organismes

La section d) du présent chapitre mentionne que certaines fois renferment des dispositions sur les intérêts qu'il est interdit de conserver et sur les conflits d'intérêts. Ces dispositions sont exécutoires. Pour leur part, les lignes de conduite complémentaires des ministères, conseil, commissions et organismes n'ont pas toujours force de loi, mais elles visent le même but.

Lors de la publication, en 1973, des lignes directrices des fonctionnaires, le Conseil du Trésor invitait les ministères et organismes à élaborer, si nécessaire, des lignes directrices complémentaires qui tiennent compte de leurs besoins particuliers. En réponse à cette demande, 80 codes de conduite ont été rédigés, et un exemplaire de chacun a été déposé à la Bibliothèque du Parlement et un autre au Bureau du sous-registraire général adjoint. On trouvera un résumé de ces dispositions dans le présent rapport.

p) Contrats et conventions collectives

Lors de sa nomination au service de l'État, la personne désignée conclut habituellement un contrat de travail. La nature

des contrats peut varier mais, en général, ceux-ci comportent des dispositions portant de près ou de loin sur les conflits d'intérêts. Lorsque le contrat est sous forme de lettre, la personne désignée accepte les conditions d'emploi en signant simplement le duplicata et en le datant. Un exemplaire des lignes directrices n'est pas nécessairement remis à l'employé, et, le cas échéant, on n'insiste pas toujours pour qu'un nouvel employé signifie qu'il a lu et compris les dispositions des lignes directrices et qu'il est disposé à s'y conformer.

Même si cela peut paraître étonnant, un certain nombre de ministères ne font aucune mention des lignes directrices au moment du recrutement d'employés ou de la signature du contrat de travail. Dans un certain nombre de cas cependant, il existe des contrats ayant valeur juridique obligatoire et qui comportent des lignes directrices concernant les conflits d'intérêts.

q) Serments ou affirmations d'office

Dès leur nomination, les ministres sont tenus de prêter le serment ou l'affirmation d'allégeance ou de déclarer solennellement qu'ils seront fidèles à la Reine et lui porteront allégeance; ensuite, ils prêtent le serment ou l'affirmation des membres du Conseil privé par lequel ils déclarent solennellement qu'ils garderont le secret absolu sur les questions qui concernent le Conseil privé, exprimeront en toute honnêteté et toute vérité leurs sentiments au sein du Conseil privé, agiront en tout ce qui concerne les affaires de Sa Majesté avec vigilance, diligence et circonspection et, enfin, ils prêtent le serment ou l'affirmation d'office par lequel ils jurent ou affirment solennellement d'accomplir au mieux de leur capacité et de leurs connaissances les devoirs de leur charge.

Dès sa nomination à la Fonction publique, un sous-chef ou tout autre fonctionnaire est tenu, en vertu de l'article 23 de la Loi sur l'emploi dans la Fonction publique, de prêter le serment ou l'affirmation d'allégeance; il doit aussi prêter le serment ou l'affirmation d'office et de discrétion. Ceux-ci ne sont pas les mêmes que pour les membres du Conseil privé. En voici les libellés:

SERMENT OU AFFIRMATION D'ALLÉGEANCE

Je _____
jure ou affirme d'être fidèle et de porter sincère allégeance à Sa Majesté la Reine, à ses héritiers et à ses successeurs en conformité de la loi.

Ainsi Dieu me soit en aide, (omettre lors d'une affirmation)

SERMENT OU AFFIRMATION D'OFFICE ET DE DISCRÉTION

Je _____
jure (ou affirme) solennellement et sincèrement que je remplirai avec fidélité et honnêteté les fonctions qui m'incombent en raison de mon emploi dans la Fonction publique et que, sans y être dûment autorisé, je ne révélerai ou ne ferai connaître rien de ce qui viendra à ma connaissance par suite de cet emploi.

Ainsi Dieu me soit en aide (ommetre lors d'une affirmation).

Le serment ou affirmation d'office et de discrétion a été promulgué par le Parlement et figure à l'annexe III de la Loi sur l'emploi dans la Fonction publique.

Outre cette exigence qui s'applique aux sous-chefs, nombre de personnes nommées par le gouverneur en conseil, dont les commissaires de la Commission de la Fonction publique, sont tenues de prêter le serment ou l'affirmation qui correspond à leur charge, et dont le texte se trouve habituellement dans la loi créant le ministère ou autre loi habilitante.

En règle générale, les personnes nommées par le gouverneur en conseil ne prêtent pas serment au moment de leur nomination. Lorsqu'elles y sont tenues, c'est un responsable au ministère ou à l'organisme employeur qui leur fait prêter le serment ou l'affirmation d'office.

Un secrétaire parlementaire n'a pas à prêter le serment ou l'affirmation d'office. Il est lié, néanmoins, par le serment d'allégeance (ou l'affirmation tenant lieu de serment) qu'il a prêté au moment de son élection comme député à la Chambre des communes.

Les membres du personnel soustrait d'un ministre n'ont pas à prêter le serment ou l'affirmation d'office. Un ministre peut exiger de son personnel qu'il prête le serment ou l'affirmation d'office et de discrétion, mais il n'existe aucune procédure particulière à cet égard.

La question de savoir si le serment ou l'affirmation a une valeur juridique ou simplement une valeur morale est examinée au chapitre 11 "Examen de problèmes particuliers".

CHAPITRE 9

CRITIQUE DES LOIS ET DES LIGNES DIRECTRICES FÉDÉRALES ACTUELLES SUR LES CONFLITS D'INTÉRÊTS

a) Introduction

En réponse à une invitation sollicitant des commentaires au sujet des lignes directrices actuelles, bon nombre nous ont fait parvenir des critiques, dont plusieurs que nous jugeons sérieuses et valides. Il convient cependant de signaler que personne n'a mis en doute la nécessité de règles écrites et la plupart ont déclaré que les directives actuelles, malgré leurs défauts, se fondent sur des principes solides et raisonnables.

b) Principales critiques

Voici les principales critiques formulées, accompagnées de nos commentaires.

1. La portée des lignes de conduite touchant les personnes nommées par le gouverneur en conseil est incertaine et trop large.

Les lignes directrices à l'intention de titulaires de charges publiques donnent la définition suivante:

> "Personnes nommées par le gouverneur en conseil" désigne les personnes nommées par le gouverneur en conseil, ou un ministre, ou avec leur approbation, ou qui reçoivent un traitement fixé par le gouverneur en conseil et qui occupent des postes à plein temps dans un ministère, une société de la Couronne ou un organisme public autonome, et non pas les personnes qui sont membres d'organismes dont les fonctions sont d'abord et avant tout quasi judiciaires.

Toutes ces personnes nommées - et, comme il est indiqué plus bas, nous ne savons pas avec certitude combien elles sont, qui elles sont ni ce qu'elles font - sont traitées de la même façon dans les lignes directrices actuelles. Par exemple, les règles touchant le dessaisissement sont les mêmes pour toutes ces personnes. C'est là, certes, une façon simple de résoudre un problème complexe, mais elle n'est ni juste ni raisonnable. C'est pourquoi nous recommandons une approche fonctionnelle selon laquelle les restrictions à l'égard des placements sont liées à la nature des fonctions et des obligations du titulaire.

La nomination des ambassadeurs, des hauts commissaires et des consuls généraux (chefs de mission) par le gouverneur en conseil et l'obligation qui leur est faite de se dessaisir de leurs placements de la même façon que les sous-ministres illustrent bien les résultats de cette approche globale. Les chefs de mission sont choisis en très grande majorité parmi les rangs des diplomates de carrière, et surtout parmi le groupe des agents du ministère des Affaires extérieures; il s'agit dans ce dernier cas de fonctionnaires dont l'emploi est rotationnel et qui sont désignés à des postes selon la politique et les méthodes de l'affectation au service extérieur. Pour ces fonctionnaires, la nomination à un poste de chef de mission fait partie d'une structure de carrière qui comprend des affectations à l'administration centrale et à l'étranger. Les chefs de mission sont aussi parfois choisis parmi les autres employés du Ministère et parmi les fonctionnaires d'autres ministères et organismes canadiens, particulièrement ceux qui ont des programmes internationaux; une fois terminée leur affectation comme chefs de mission, ils retournent d'ordinaire à leur ancien poste ou à un poste similaire.

Il y a une iniquité fondamentale à appliquer les lignes directrices touchant les personnes nommées par le gouverneur en conseil aux fonctionnaires affectés à un poste de chef de mission sans les appliquer à ceux qui détiennent des postes comportant une responsabilité égale ou supérieure au Canada. La possibilité d'un conflit d'intérêts réel ou éventuel est au moins aussi grande pour les fonctionnaires de rang et de responsabilité équivalents travaillant au Canada, qui participent à des décisions pouvant entraîner des conséquences commerciales immédiates et directes (dans le domaine des subventions régionales, de la mise en valeur énergétique ou de la production minière, par exemple) ou qui ont des fonctions administratives comme l'achat de biens ou de matériel pour le gouvernement, l'embauche d'employés, l'affectation de subventions et l'adjudication de contrats. Ces fonctionnaires ne sont pas soumis aux lignes de conduite à l'intention des personnes nommées par le gouverneur en conseil auxquelles les chefs de mission doivent se conformer.

Il est parfois difficile pour les chefs de mission de se conformer aux lignes de conduite parce que, à la différence des autres personnes nommées par le gouverneur en conseil, ils occupent des postes à l'extérieur du Canada. Il leur faut occasionnellement prendre des dispositions à cet égard aux derniers stades de la mutation ou lorsqu'ils sont déjà en poste. Ils doivent donc échanger une volumineuse correspondance avec le Bureau du sous-registraire général adjoint, des sociétés de fiducie, des avocats, des conseillers en placement, des courtiers en valeurs et d'autres intermédiaires et, dans certains cas en subissant des répercussions émotives, avec les membres intéressés de leur famille. Une fois terminée leur affectation à l'étranger,

si ces personnes désirent gérer elles-mêmes leurs biens, elles doivent alors suivre une démarche inverse puisque de telles dispositions ne sont pas nécessairement requises pour occuper une affectation à l'administration centrale.

Il existe parmi ce groupe un certain élément de frustration à cause de la valeur relativement modeste des biens en cause, soit souvent une résidence au Canada qui doit inévitablement être louée pendant l'absence du propriétaire, ou des actions obtenues par héritage, dont la valeur est plus sentimentale que commerciale. Puisque, en général, la distance entre la mission et le Canada réduit au lieu d'augmenter la probabilité qu'un chef de mission ait accès à des renseignements privilégiés, les chefs de mission de carrière trouvent anormal et discriminatoire d'être soumis à des lignes de conduite et à des contraintes plus rigoureuses que les fonctionnaires dont ils relèvent dans leur ministère.

Les devoirs et les fonctions des chefs de mission sont très différents de ceux des sous-chefs des ministères et organismes. Il n'y a donc aucune raison pour que ces personnes soient soumises aux mêmes lignes de conduite. Nous croyons qu'il serait plus à-propos de les traiter comme les autres fonctionnaires relevant du sous-secrétaire d'État aux Affaires extérieures.

On a attiré notre attention sur le cas d'un directeur exécutif du Conseil des normes du Canada. Une fois nommé, il a dû, à sa grande surprise et à sa grande consternation, se conformer entièrement aux règles de dessaisissement, quoiqu'il n'y avait peu ou pas de conflit entre ses fonctions publiques et ses intérêts privés. Nous croyons, d'après les mémoires qui nous ont été présentés, que son cas n'est pas unique parmi les personnes nommées par le gouverneur en conseil.

La structure actuelle des directives aboutit à des manques d'uniformité et à des injustices, tout simplement parce que, d'une part, les personnes nommées par le gouverneur en conseil sont assujetties à des règles uniformes et très rigoureuses en matière de placements, alors que d'autres fonctionnaires sont soumis à un régime qui permet au chef du ministère ou de l'organisme d'exercer son jugement. Le groupe de travail a entendu parler, par exemple, de fonctionnaires du niveau de sous-ministre adjoint qui n'étaient pas obligés de se dessaisir de leurs biens mais qui surveillaient les activités de chefs d'organismes nommés par le gouverneur en conseil et donc assujettis aux règles en matière de dessaisissement. Techniquement, les chefs d'organismes relèvent du ministre, mais les membres du Groupe de travail sont bien au courant du fait que, pour des raisons administratives, le ministre doit souvent déléguer ses pouvoirs.

Un autre problème rencontré est celui de l'incertitude quant à savoir qui est soumis aux lignes de conduite touchant les

personnes nommées par le gouverneur en conseil, malgré la définition donnée ci-dessus. Les sous-ministres sont visés, de même que les présidents à plein temps des sociétés et organismes d'État, à l'exception des personnes qui sont membres d'organismes dont les fonctions sont surtout judiciaires ou quasi judiciaires. Cependant, il existe des divergences d'opinions au sein même du gouvernement quant à la définition des organismes dont les fonctions sont surtout judiciaires ou quasi judiciaires. En outre, nous ne disposions pas d'une liste complète des présidents à plein temps des sociétés et des organismes d'État nommés par le gouverneur en conseil ou par les ministres. Leur nombre, nous dit-on, s'élève à un peu plus d'une centaine. Cette lacune n'a cependant pas affecté la nature de nos recommandations. En effet, le nombre des personnes nommées par le gouverneur en conseil et les ministres montre bien qu'il est important d'adapter les méthodes visant à réduire les conflits d'intérêts, sur une base fonctionnelle, à la nature des fonctions et des responsabilités des divers titulaires.

2. Le contenu et l'administration des lignes directrices des ministères et organismes manquent d'uniformité

Si l'on a reproché aux lignes de conduite touchant les personnes nommées par le gouverneur en conseil d'être trop générales, on a reproché aux lignes directrices des ministères leur manque d'uniformité au point de vue à la fois de leur contenu et de leur l'administration. C'est au sous-ministre ou au chef de l'organisme qu'est confié le pouvoir discrétionnaire de décider des mesures que devraient prendre leurs employés pour minimiser les conflits d'intérêts. Cela est souhaitable compte tenu de la diversité des fonctions et des responsabilités des divers ministères. Par exemple, les règles de dessaisissement applicables à un sous-ministre adjoint des Finances pourraient différer de celles qui s'appliquent à un sous-ministre adjoint de l'Agriculture. Il y a cependant des raisons de croire qu'à cause de l'importance de l'attitude des sous-ministres et des chefs d'organismes à l'égard des problèmes de conflits d'intérêts, il y a un net manque d'uniformité sur le plan de l'application des lignes directrices des ministères et organismes et un certain manque d'uniformité dans leur contenu. On s'attend à ce que la conduite de tous les fonctionnaires puisse subir l'examen le plus minutieux. Pourtant, certains sont soumis à un examen et d'autres pas.

La création du Bureau de l'éthique dans le secteur public, dont l'une des tâches serait de conseiller les sous-ministres et chefs d'organismes dans la préparation et l'administration des codes d'éthique des ministères et organismes, favoriserait l'uniformité et l'équité.

3. L'application des lignes de conduite touchant les personnes nommées par le gouverneur en conseil aux cadres des sociétés de la Couronne nuit à leur position concurrentielle

Deux commentaires généraux ont été présentés. En premier lieu, quelles que soient les restrictions, elles devraient avoir un rapport fonctionnel avec les activités de la société de la Couronne à laquelle la personne en cause est nommée; tous ne devraient pas sans distinction devoir se dessaisir des valeurs qu'ils détiennent. Le dessaisissement qui convient pour réduire les conflits d'intérêts du président de la Société canadienne d'hypothèques et de logement ne convient pas nécessairement au président d'Air Canada. Deuxièmement, en empêchant les présidents et par implication les titulaires d'autres charges de faire partie du conseil d'administration d'autres sociétés, les lignes de conduite défavorisent les sociétés de la Couronne par rapport à leurs concurrents privés qui ne sont pas soumis à de telles restrictions. Le chapitre 17 est consacré à une étude de ces questions et il contient des recommandations à cet égard.

4. L'absence de pouvoirs discrétionnaires à l'égard de l'administration des lignes directrices

Un des problèmes les plus graves que pose la structure actuelle à l'égard des conflits d'intérêts et des emplois ultérieurs est peut-être le manque de souplesse pour l'application des directives à des cas particuliers. Nous avons déjà mentionné le cas d'une employée qui a été obligée de placer en fiducie les 10 actions de Bell Canada que lui avait léguées sa grand-mère afin de se conformer à la lettre des lignes directrices.

Il semble qu'en raison de ce manque de souplesse et de l'absence d'une règle de minimis, ceux qui administrent les lignes directrices soient forcés d'en appliquer la lettre plutôt que l'esprit, ce qui entraîne dans de nombreux cas un important fardeau administratif supplémentaire. Un ancien titulaire de charge publique entendu par le Groupe de travail a présenté son dossier personnel de divulgation qui avait été tenu par le sous-registraire général adjoint pendant qu'il était titulaire nommé par le gouverneur en conseil. On lui a remis son dossier fermé lors de sa retraite et il a été frappé de voir la correspondance qu'avaient suscité des avoirs relativement peu importants. Il constatait cependant que le Bureau du sous-registraire général adjoint n'avait peut-être pas suffisamment de latitude pour pouvoir juger jusqu'à quel point une personne se conformait à l'intention des lignes de conduite plutôt que de s'en remettre au détail technique.

On a mis sur pied des comités consultatifs sur les emplois ultérieurs chargés d'interpréter les lignes directrices et de donner des avis sur les cas dont ils sont saisis. Ce système de comité a été conçu dans le but d'assurer le public que l'on a étudié en détail dans quelle mesure il convient qu'un titulaire de charge publique se livre à certaines activités. Au départ, on croyait que les comités pourraient interpréter les lignes directrices d'une façon plus large que le titulaire ne se sentirait en droit de le faire de sa propre initiative. On croyait également que ce système protégerait mieux contre tout reproche ultérieur le titulaire qui aurait demandé et suivi les conseils du comité. Les comités détiennent le pouvoir de recommander des exemptions à l'égard de ces lignes directrices lorsque l'équité envers l'individu ou le bien public l'exige. En fait, les archives indiquent que ces comités se sont rarement réunis et qu'un très petit nombre d'exemptions ont été demandées.

Il est facile de comprendre que l'on hésite à demander l'avis d'un comité à l'égard d'un emploi éventuel, surtout si l'on croit que le comité pourrait conseiller de ne pas l'accepter. Dans certains cas, l'intérêt public serait mieux servi si l'on encourageait les gens à utiliser dans le secteur privé les connaissances et l'expérience acquises dans le secteur public, particulièrement ses relations avec le gouvernement. Pourtant, le conflit d'intérêts apparent dans un tel cas découragerait de nombreuses personnes, même s'il n'y avait aucun conflit réel.

Les périodes de transition après l'emploi, si on les interprète littéralement, sont très contraignantes au point de vue des activités permises. Les personnes hautement spécialisées pourraient éprouver des difficultés à trouver un emploi après avoir été au service du gouvernement. Il y a de nombreux cas où il serait à-propos de ne pas imposer une période de transition ou de la raccourcir. Il n'existe à l'heure actuelle aucun mécanisme qui le permette à moins que le comité consultatif en cause ne recommande une exemption. Nous croyons qu'un conseiller en éthique du genre de celui que nous proposons pourrait exercer, dans certaines limites, un pouvoir discrétionnaire dans ce cas.

5. Les lacunes des dispositions de fiducie

Nous nous attendions à entendre des objections à l'obligation imposée aux ministres et aux personnes nommées par le gouverneur en conseil de se dessaisir de certains investissements en les plaçant en fiducie. On nous a effectivement présenté de telles objections et il est important de noter ici la partie de l'insatisfaction exprimée par certaines des personnes soumises aux lignes directrices actuelles.

Certains s'opposaient en principe à l'obligation de se dessaisir car celle-ci dénotait un manque de confiance en

l'intégrité des titulaires de charges publiques. D'autres s'y opposaient parce que, à leur avis, les mandataires des fiducies sans droit de regard géraient mal leur portefeuille, ce qui entraînait pour eux et pour leur famille de graves pertes financières, qui leur semblaient grossièrement injustes.

Même si nous ne voyons aucune façon réalisable de remplacer les fiducies pour se dessaisir temporairement de biens qui pourraient impliquer des conflits entre les charges publiques et les intérêts privés (à part la divulgation qui ne peut servir que dans une mesure limitée) la population devrait savoir que des fiducies sont au mieux un instrument imparfait dont l'administration peut entraîner des sacrifices injustes pour ceux qui décident d'entrer au service de l'État, qu'ils soient élus ou nommés. Il est donc d'autant plus important de s'assurer que l'obligation de se dessaisir est vraiment nécessaire pour minimiser les conflits d'intérêts et qu'elle est administrée avec toute la souplesse que permet l'esprit des règles.

Nous avons reçu des plaintes quant au coût d'établissement d'une fiducie sans droit de regard. Dans certains cas, les frais annuels de fiducie, de gestion et d'administration dépassaient le revenu annuel. Même si le gouvernement a récemment apporté certains redressements à cet égard en accordant une aide financière, le problème demeure pour ceux qui détiennent une petite quantité d'actions. C'est là une autre raison pour laquelle nous sommes en faveur d'établir une règle de minimis et de permettre aux ministres l'option des fiducies en compte bloqué.

6. Les rapports entre les lignes directrices sur les conflits d'intérêts et le Code criminel

Un syndicat de la fonction publique nous a exprimé son inquiétude quant à la nature de certaines dispositions du Code criminel dans la mesure où elles s'appliquent aux fonctionnaires.

Il se peut en effet qu'il y ait des problèmes à concilier les dispositions du Code criminel et les lignes directrices, particulièrement quelques dispositions pointilleuses de certains codes complémentaires et de certaines mesures législatives. Nous ne recommandons pas de modifier le Code criminel, mais plutôt de préciser les principes et les règles régissant les cas de conflits d'intérêts de nature non criminelle, de sorte qu'il soit plus facile d'entrevoir, de différencier et de comprendre les rapports entre les dispositions criminelles et les autres.

7 La divulgation

Les lignes de conduite actuelles touchant les personnes nommées par le gouverneur en conseil permettent d'opter pour la déclaration publique de certains biens, d'une façon très restreinte et limitée en stipulant qu'il n'est pas possible

d'utiliser cette formule pour des titres ou valeurs cotés en bourse, ou pour des biens dont la gestion pourrait éventuellement provoquer un conflit d'intérêts chez un haut fonctionnaire. Les lignes directrices actuelles offrent aux ministres une option restreinte similaire, bien que les définitions soient quelque peu différentes.

On nous a fait valoir que la déclaration publique devrait être plus aisément disponible comme solution plausible au dessaisissement tant pour les ministres que pour les personnes nommées par le gouverneur en conseil. Cette possibilité est abordée au chapitre 6.

8. Les lignes directrices sur l'après-mandat

La presque totalité de ceux qui nous ont présenté des commentaires personnellement ou par écrit critiquaient certains aspects des règles applicables aux anciens titulaires de charges publiques, notamment:

i) L'observance

Les lignes directrices ne sont pas des lois. Bien que les titulaires actuels de charges publiques puissent être soumis à des sanctions disciplinaires s'ils les enfreignent, il ne saurait en être ainsi à l'égard des anciens titulaires. En conséquence, si le civisme et la conscience de certains anciens titulaires de charges publiques les portent à se conformer aux lignes directrices, ceux dont le sens civique est moins aigu et la conscience moins susceptible, ou ceux qui sont simplement en désaccord avec celles-ci, ne se sentent pas obligés de les respecter.

ii) L'ambiguïté

Même les personnes qui s'efforcent de respecter les lignes directrices ne sont pas toujours certaines de leur signification. Par exemple, que veut dire "exercer des pressions" ou "lobbying" ?

iii) La durée de la période de transition

On critique en général la durée de la période de transition prévue dans les lignes directrices concernant les emplois ultérieurs qui s'appliquent aux ministres, aux secrétaires parlementaires et aux fonctionnaires. En particulier, on trouvait excessif le délai de deux ans imposé aux anciens ministres, sous-ministres, chefs d'organismes et membres du personnel soustrait avant qu'ils puissent accepter un poste d'administrateur ou faire du lobbying ou exercer des pressions, compte tenu du "délai de conservation" très bref dans notre monde contemporain des renseignements confidentiels obtenus par le titulaire dans

l'exercice de ses fonctions. La période de transition à laquelle les secrétaires parlementaires et les fonctionnaires sont assujettis est d'un an.

iv) Les directives actuelles ont un effet négatif

On a soutenu devant nous qu'il est dans l'intérêt public qu'il y ait des échanges réciproques de personnel entre le monde des affaires et le gouvernement et que certaines des restrictions que comportent les lignes directrices actuelles concernant les emplois ultérieurs nuisent sans nécessité à de tels échanges.

v) Les anciens ministres et les anciens fonctionnaires ne devraient pas être traités de la même façon

Les anciens ministres ne font pas face aux mêmes problèmes que les anciens fonctionnaires lorsqu'ils cherchent un emploi dans le monde des affaires. Il est rare que des ministres qui ont déjà été en affaires démissionnent volontairement pour prendre un emploi dans le secteur privé. Une forte proportion d'entre eux sont obligés, d'une façon ou d'une autre, de quitter leur poste et doivent se trouver un emploi; les lignes directrices actuelles sur les emplois ultérieurs ne tiennent pas compte de ce fait et appliquent les mêmes règles tant aux anciens ministres qu'aux anciens fonctionnaires.

vi) Il existe, chez les fonctionnaires d'un rang inférieur à celui de sous-ministre, des problèmes à l'égard de l'après-mandat dont ne tiennent pas suffisamment compte les lignes directrices actuelles

On nous a fait valoir que, dans certains ministères, il n'est pas rare que des fonctionnaires de rang moyen démissionnent de la fonction publique pour prendre un emploi dans des sociétés avec lesquelles ils ont traité dans l'exercice de leurs fonctions. Notre mandat ne nous autorisait pas à enquêter sur des allégations de ce genre et nous ne l'avons pas fait. Elles servent toutefois à souligner que peu importe les règles en vigueur, elles devraient s'appliquer à tous les paliers de la hiérarchie gouvernementale et d'une façon équitable.

vii) L'embauche d'anciens fonctionnaires par le gouvernement

L'appendice V de l'une des lignes directrices actuelles (reproduit à l'annexe D) contient au paragraphe 2 une décision administrative sur l'embauchage d'anciens fonctionnaires qui n'a rien à voir avec les conflits d'intérêts.

CHAPITRE 10

AUTRES FAÇONS D'ABORDER LES NORMES DE CONDUITE

a) Introduction

Le mandat que vous nous avez confié, Monsieur le Premier ministre, nous demande d'examiner l'expérience acquise en cette matière par d'autres gouvernements, tant au Canada qu'à l'étranger, et dans le secteur privé.

Nous avons examiné assez en détail les dispositions actuelles régissant les conflits d'intérêts aux paliers provincial, territorial et municipal au Canada et nous avons étudié comment les associations professionnelles et les entreprises commerciales du Canada abordent le sujet de l'éthique chez leurs membres et leurs employés. Nous avons également étudié l'expérience américaine, tant au palier fédéral que dans plusieurs États. À l'étranger, nous sommes penchés sur d'autres pays du Commonwealth, soit le Royaume-Uni, l'Australie et la Nouvelle-Zélande.

Les mesures prises à l'égard des conflits d'intérêts et les normes de conduite varient considérablement d'un gouvernement à l'autre. Le présent chapitre présente un résumé explicatif des dispositions et des mesures adoptées ailleurs. Certains principes ou solutions sont étudiés en plusieurs endroits du présent rapport.

b) Expérience des provinces

Les dispositions du Code criminel, dont nous avons parlé à propos des lois fédérales sur les conflits d'intérêts, s'appliquent dans toutes les provinces et les deux territoires. Il y a donc partout le même point de départ, une base sur laquelle se contruisent les autres règles en matière d'éthique.

On peut formuler plusieurs observations générales. Dans la plupart des cas, la divulgation exigée des ministres et des députés au palier provincial est publique (elle se fait par l'entremise du greffier de l'assemblée législative), alors que pour les fonctionnaires, elle est confidentielle. Les sous-ministres sont souvent assujettis à la même législation que les ministres. Dans certaines provinces, les titulaires de charges publiques ne doivent divulguer que les biens (particulièrement les terrains) situés dans la province, alors qu'ailleurs on ne fait

pas cette distinction. La situation des sociétés de la Couronne varie considérablement d'une province à l'autre, certaines provinces appliquant les mêmes règles à ces sociétés qu'à la Fonction publique, et d'autres pas. Nous allons étudier à tour de rôle le cas de chaque province.

Colombie-Britannique

La "Constitution Act", la "Financial Disclosure Act" (1974) et la "Public Service Act" sont les trois principales lois dans ce domaine. Un certain nombre de dispositions visent les députés à l'assemblée législative de la Colombie-Britannique aussi bien que les ministres du Cabinet. Comme nous l'avons fait à l'égard des ministres et des secrétaires parlementaires fédéraux, nous prenons acte des dispositions qui s'appliquent aux simples députés, puisqu'elles constituent un ensemble de règles de base auxquelles ceux qui sont nommés au Cabinet doivent déjà se conformer.

En vertu de la "Constitution Act", aucun député à l'assemblée législative n'est autorisé à accepter de l'argent de la Couronne du chef de la province pour la fourniture à la province de biens, de services ou de travail, non plus que d'accepter de l'argent pour une charge ou un emploi doté par la Couronne du chef de la province. Ces règles, qui figurent aux articles 26 et 33, comportent des exceptions pour des questions accessoires visant dans la plupart des cas des versements dans le cadre d'un programme d'application générale auquel le député est admissible du fait de son appartenance à un groupe plus considérable.

Les articles 26 et 33 de cette loi disposent également (encore une fois avec des exceptions précises) qu'aucun député à l'assemblée législative ne peut agir comme administrateur ou cadre supérieur, selon la définition de la "Company Act", d'une société, ni être un actionnaire à qui s'applique le paragraphe 5(1) de la "Financial Disclosure Act". Tout député qui contrevient à ces dispositions de la "Constitution Act" peut être déclaré inhabile à siéger. Il en est de même si, entre autres, il fait faillite, devient insolvable ou est trouvé coupable d'un manquement ou d'un crime infamant.

En vertu de la "Financial Disclosure Act" de 1974, toute personne qui accepte d'être candidat à une élection à une charge provinciale ou municipale (ce qui comprend les ministres et les députés à l'assemblée législative) doit faire une déclaration écrite. Les titulaires de ces charges, de même que les fonctionnaires provinciaux et municipaux, doivent présenter une déclaration écrite deux fois par année. La personne qui cesse d'être titulaire d'une charge doit déposer une déclaration écrite dans les 15 jours qui suivent la fin de son mandat. Cette déclaration doit comprendre: 1) le nom des sociétés dont le

titulaire détient une ou plusieurs actions, 2) le nom de chaque entreprise de Colombie-Britannique dont le titulaire reçoit une rémunération pour des services rendus à titre d'employé, de propriétaire, de fiduciaire, etc., 3) le nom de ses créanciers et 4) les terres situées dans la province, dans lesquelles le titulaire a un intérêt. Si le titulaire détient plus de 30% des votes pour l'élection des administrateurs d'une société (y compris des titres dont il est codétenteur avec un conjoint, un enfant, un frère, une soeur, une mère ou un père), l'article 5 de la loi exige une somme considérable de renseignements supplémentaires.

La divulgation par les titulaires élus de charges provinciales et municipales est publique, et se fait par l'entremise d'un greffier. Le défaut de présenter une déclaration écrite est passible d'une amende n'excédant pas 10 000 dollars. Si elle juge qu'il y a eu infraction volontaire à la "Financial Disclosure Act", la Cour suprême de la Colombie-Britannique peut ordonner au contrevenant de payer à l'employeur (le gouvernement de la Colombie-Britannique ou le gouvernement local) la valeur du gain financier réalisé. Pour ce qui est des fonctionnaires, il faut signaler que la "Financial Disclosure Act" s'applique également aux fonctionnaires désignés, bien que nous croyons savoir qu'aucun n'ait encore été désigné. La "Public Service Act" comporte plusieurs articles portant sur les conflits d'intérêts. Par exemple, un fonctionnaire ne peut accepter un emploi rémunéré d'un autre employeur ni faire des affaires sans l'approbation de la Commission de la Fonction publique. Un sous-ministre peut détenir un poste d'administrateur ou de dirigeant dans une société de la Couronne s'il est nommé par le lieutenant-gouverneur en conseil, mais il ne peut accepter de rémunération à cet égard.

Dans les cas où les employés municipaux ou provinciaux (y compris ceux des commissions, agences ou bureaux relevant de la "Public Service Act" pour les personnes nommées par le lieutenant-gouverneur en conseil) sont assujettis à la "Financial Disclosure Act", il doit y avoir divulgation complète, mais non publique. Cependant, la Cour suprême de la Colombie-Britannique peut rendre publics les renseignements divulgués en cas d'action intentée contre un fonctionnaire provincial ou municipal pour infraction à la "Financial Disclosure Act". Divers ministères travaillent à élaborer des lignes directrices sur les conflits d'intérêts, qui doivent être approuvées par la Commission de la Fonction publique.

Alberta

La province de l'Alberta a des lois et un code de conduite à l'égard des conflits d'intérêts. La "Legislative Assembly Act" (1983) traite d'une façon très complète des conflits d'intérêts; si un député ou une personne qui lui est directement associée devient partie à certains genres de contrats avec le gouvernement, y compris, sous réserve d'exceptions restreintes, la vente de terrains au gouvernement, il devient inhabile à siéger ou

inéligible. Il en est de même si un député à l'assemblée législative ou une personne qui lui est associée accepte des deniers publics.

Les députés à l'assemblée législative peuvent demander conseil, ex parte, à un tribunal, à l'égard de contrats. Chaque membre doit déposer une divulgation, portant le nom et l'adresse de chaque personne avec qui il est, ou a été, directement associé. Le trésorier provincial de l'Alberta doit déposer un rapport annuel à l'Assemblée, ce qui en fait un document public, indiquant les noms des députés à l'assemblée législative, des personnes directement associées avec eux ainsi que des renseignements sur les paiements faits aux ministres et à ceux qui leur sont directement associés.

La Loi permet à un député à l'assemblée législative de placer ses biens dans une fiducie sans droit de regard. Les députés ne peuvent posséder, directement ou indirectement, des actions dans une société publique dont les affaires pourraient être influencées par le gouvernement de l'Alberta. Cette règle découle de l'énoncé de politique de 1973 du Premier ministre (voir plus bas).

Les ministres de l'Alberta doivent déposer (et mettre à jour) une déclaration auprès du greffier de l'assemblée (ce qui en fait un document public). Cette déclaration donne une description légale de toutes les terres de l'Alberta, y compris les droits miniers, la liste des noms des sociétés privées de l'Alberta, de même qu'une description de toutes les entreprises et associations, à l'égard desquels le ministre ou sa famille détient un intérêt. La loi ne définit pas le terme "famille", mais selon l'énoncé de politique du Premier ministre, la famille d'un ministre comprend son conjoint et ses enfants mineurs.

Les conflits d'intérêts impliquant les fonctionnaires sont surtout traités dans "The Code of Conduct and Ethics for the Public Service of Alberta". Ce code s'applique à tous les fonctionnaires, y compris les personnes engagées à contrat en vertu de la "Public Service Act". Le code permet expressément aux fonctionnaires de prendre des emplois supplémentaires, sauf dans les cas où cela entraîne un conflit d'intérêts réel ou apparent. Les fonctionnaires ont le devoir d'avertir l'employeur lorsqu'un conflit d'intérêts pourrait se produire. Ils ne peuvent accepter d'argent ou de paiement en plus de leur traitement normal pour des fonctions de service public.

L'employé doit déclarer ses intérêts commerciaux ou financiers, et ceux de son conjoint et de ses enfants de moins de 18 ans, lorsque les actes et les fonctions de l'employé à titre de fonctionnaire ont ou semblent avoir une incidence sur ces intérêts. Dans le cas d'un conflit réel ou éventuel, les intérêts commerciaux ou financiers peuvent, avec l'approbation du sous-

chef, être placés dans une fiducie sans droit de regard. Aucun fonctionnaire qui participe à la vente ou à l'achat de biens pour la Couronne ne peut acquérir ou vendre ces biens sans approbation. Il n'y a aucune restriction expresse quant aux emplois ultérieurs.

Saskatchewan

La "Members of the Legislative Assembly Conflit of Interest Act" (1980) vise surtout les contrats gouvernementaux, la vente ou la disposition de terrains et les prêts et les emprunts d'argent à la Couronne. Cette loi dispose qu'aucun député à l'assemblée législative ne peut participer à un contrat gouvernemental. Ainsi, un député ne peut avoir un intérêt bénéficiaire dans une entreprise (ou une filiale) qui a un intérêt dans un contrat gouvernemental, ni en être actionnaire, associé, administrateur, directeur ou cadre. Il y a un certain nombre d'exceptions précises, comme le droit de détenir certaines licences et certains permis (par exemple de couper du foin et du bois ou d'exercer la médecine vétérinaire).

Les députés doivent déclarer chaque année, sous serment, au greffier de l'assemblée la nature et l'étendue de leur participation à un contrat gouvernemental, le cas échéant, ou celle d'un membre de leur famille. La famille comprend le conjoint et les enfants à charge. Les députés doivent également divulguer le nom de toute entreprise ou personne devant au député ou à sa famille une somme de plus de 5 000 dollars, tout droit, titre ou intérêt à l'égard d'un immeuble situé en Saskatchewan ou à l'extérieur lui appartenant ou appartenant à sa famille, le nom du député ou de tout membre de sa famille qui était actionnaire, associé, administrateur, directeur ou cadre d'une entreprise intéressée à un contrat gouvernemental ou qui détenait un intérêt dans cette entreprise, ainsi que les détails des subsides de la Couronne. Il y a toutefois certaines exceptions.

La loi prévoit une amende ne dépassant pas 10 000 dollars en cas d'infraction. Si l'infraction se poursuit après la déclaration de culpabilité, le contrevenant est passible d'une amende supplémentaire de 10 000 dollars chaque jour. La déclaration de culpabilité rend également le député inhabile à siéger. La loi ne comporte aucune disposition post-parlementaire.

La "Public Service Act" de la Saskatchewan, à l'article 51, interdit aux fonctionnaires de participer à une entreprise ou d'exercer en privé une profession ou un métier, à titre de dirigeant ou d'agent. Les contrevenants sont passibles d'une amende ne dépassant pas 200 dollars ou d'une peine d'emprisonnement ne dépassant pas trois mois, ou des deux.

Par le serment d'office, prévu à l'article 19 de la loi, le fonctionnaire s'engage à ne pas demander ni recevoir d'argent, de services, de récompense ou de choses en échange de l'exercice de ses fonctions, si ce n'est son salaire du gouvernement; il ne doit pas non plus divulguer de renseignements confidentiels.

Les "Saskatchewan Public Employees Conflict of Interest Guidelines" visent également les fonctionnaires. Au sens de ces lignes directrices, un conflit d'intérêts désigne toute situation qui pourrait soit nuire à l'exercice objectif des fonctions du fonctionnaire, soit lui conférer un bénéfice ou un avantage en raison de sa situation dans la fonction publique. Les lignes directrices (en plus du serment d'office) interdisent également l'acceptation de cadeaux.

Tout fonctionnaire doit déclarer ses actifs financiers ou ses placements qui sont directement ou indirectement liés à l'objet de son travail. Il doit arranger ses affaires privées et financières de façon à éviter les conflits réels ou apparents et il doit aviser l'employeur lorsqu'il constate un conflit ou une possibilité de conflit. Il doit déclarer les biens de son conjoint et de sa famille immédiate s'il peut y avoir un conflit réel ou apparent.

De même, l'employeur peut exiger d'un fonctionnaire la pleine divulgation s'il perçoit la possibilité d'un conflit d'intérêts. Les fonctionnaires qui exercent des fonctions de régie ou d'inspection ou un pouvoir discrétionnaire ne doivent pas accorder un traitement de faveur à leur famille, à leurs amis ou aux organismes auxquels ils sont associés.

Les lignes directrices traitent des activités (financières et commerciales) du conjoint du fonctionnaire et de sa famille immédiate. Cependant, le paragraphe E2 va encore plus loin et donne à l'employeur le pouvoir discrétionnaire de décider s'il existe un conflit par suite de l'interaction d'un fonctionnaire avec un "membre de sa famille" (parce que les liens familiaux varient d'une famille à l'autre). Le fonctionnaire peut être obligé de se dessaisir de ses intérêts financiers ou de les placer en fiducie sans droit de regard.

Il existe un énoncé de politique qui prévoit qu'aucun membre de la même famille ne peut être employé dans la même unité de travail (sous réserve de certaines exceptions). Les lignes directrices ne comportent aucune disposition sur les emplois ultérieurs, si ce n'est de façon indirecte par l'obligation qui est faite à l'employé de ne pas se laisser influencer par la perspective d'un emploi ailleurs.

Manitoba

Les dispositions touchant les députés du Manitoba figurent à la "Legislative Assembly Act"; cependant on nous apprend qu'un nouveau projet de loi portant sur les conflits d'intérêts est actuellement à l'étude.

La "Legislative Assembly Act" interdit à toute personne détenant une charge, un brevet ou un emploi ou recevant une rétribution de la Couronne du chef du Manitoba d'être député (il y a cependant exception dans le cas des coroners et des juges de paix). Quiconque détient ou entreprend, directement ou indirectement, un contrat avec la province n'est pas éligible à être député. On trouve cependant une longue liste d'exceptions à l'article 19 de la loi. Toute personne inéligible en raison des interdictions de la loi est passible d'une amende de 200 dollars par jour tant qu'elle siège comme député.

L'assemblée elle-même peut décider de l'emprisonnement pour une infraction à l'article 42 (par exemple, l'acceptation d'un pot-de-vin). Aucun député ne peut recevoir, ou convenir de recevoir, directement ou indirectement une indemnisation pour des services relatifs à une affaire dont est saisie l'assemblée. En cas d'infraction, il est passible d'une amende de 500 dollars.

Aucun avocat associé à un député ne doit accepter ou recevoir, directement ou indirectement, un honoraire, une indemnisation ou une récompense à l'égard d'une affaire dont est saisie l'assemblée, sous peine d'une amende de 500 dollars.

La loi ne contient aucune mention du conjoint ou des enfants mineurs d'un député, de la divulgation ou du dessaisissement, non plus que de restrictions touchant la période post-parlementaire.

Pour la fonction publique du Manitoba, les conflits d'intérêts sont mentionnés au serment d'office par lequel le fonctionnaire déclare qu'il ne demandera ni ne recevra d'argent, de service, de récompense, ou quelque chose que ce soit à l'exception de son salaire légitime et qu'il ne divulguera pas de renseignements confidentiels.

Le gouvernement provincial a rédigé des lignes directrices sur les conflits d'intérêts et les a soumises aux agents de négociation de la fonction publique qui n'avaient pas encore, au moment de la rédaction, signifié leur accord.

Ces lignes directrices sont extrêmement simples et peuvent être complétées par des dispositions particulières à chaque ministère. Elles stipulent que les employés ne peuvent se livrer, directement ou indirectement, à des transactions commerciales personnelles en vue d'un bénéfice découlant de leurs

fonctions officielles ou de renseignements confidentiels dont ils sont détenteurs. Les fonctionnaires ne doivent pas poser d'actes officiels si un intérêt personnel ne permet pas un jugement impartial, aucune activité commerciale ou financière, directe ou indirecte, ne doit être en conflit, avec leurs fonctions officielle, et ils ne doivent pas être obligés envers qui que ce soit dans l'exercice de leurs fonctions officielles. Les sources réelles ou prévisibles de conflit doivent être divulguées. Lorsqu'ils demandent des précisions, les fonctionnaires sont avisés des mesures à prendre. Les lignes directrices ne mentionnent ni le conjoint ni la famille immédiate du fonctionnaire et il n'y a aucune disposition sur l'après-mandat. Il semble que les lignes directrices s'appliqueront aux organismes, conseils et commissions, mais aucune mention n'est faite des sociétés de la Couronne.

Ontario

Des lignes directrices visant les ministres et les adjoints parlementaires ont été présentées après une déclaration du Premier ministre à l'assemblée législative en 1972. À l'époque, le Premier ministre jugeait que ces lignes directrices sur les conflits d'intérêts avaient une portée plus large et étaient plus définitives et précises que tout autre ensemble de lignes directrices précédemment énoncées par un gouvernement comparable au Canada ou ailleurs.

Conformément à ces lignes directrices les ministres et les adjoints parlementaires, ainsi que leurs conjoints et leurs enfants mineurs, ne peuvent acheter, directement ou indirectement, des terres ou des intérêts dans des terres en Ontario, si ce n'est pour leur usage personnel. Aucune société privée dans laquelle le ministre ou l'adjoint parlementaire détient un intérêt ne peut participer à un contrat avec le gouvernement de l'Ontario. Lorsqu'un ministère est saisi d'une affaire impliquant un intérêt personnel, le ministre doit demander qu'un collègue soit officiellement nommé pour agir au nom du ministère dans cette affaire. Les ministres doivent s'abstenir de participer quotidiennement à une activité commerciale ou professionnelle.

Les ministres ou les adjoints parlementaires, doivent divulguer publiquement (c'est-à-dire au greffier de l'assemblée législative), les biens qu'ils détiennent ou que leurs conjoints et leurs enfants mineurs détiennent, directement ou indirectement. Par "biens" on entend les terrains, sauf ceux qui servent à un usage domiciliaire ou récréatif privé, toutes les actions ou les créances à l'égard de sociétés privées et de terrains ainsi que toutes les associations et entreprises individuelles dont ils font partie.

Ils doivent également se dessaisir des actions des sociétés publiques, entre autres par une fiducie sans droit de

regard. Il n'y a aucune disposition visant la période post-parlementaire.

Les lignes directrices à l'intention des fonctionnaires ont été élaborées en 1973 et plus tard converties en règlement en vertu de la "Public Service Act". Dans un communiqué émis en 1973, le Premier ministre a déclaré que le conflit d'intérêts était une question morale autant que juridique.

En plus du règlement, il existe un manuel d'administration de l'Ontario qui contient une politique sur les conflits d'intérêts qui reprend l'esprit et le libellé du règlement. Selon le règlement, c'est au fonctionnaire qu'il revient de percevoir, identifier et divulguer un conflit d'intérêts possible lorsqu'il pourrait recevoir un avantage personnel; il doit se conformer aux conseils reçus. De même, si ses activités extérieures sont susceptibles de le mettre en situation de conflit, le fonctionnaire doit les divulguer et se conformer aux conseils reçus. Les contrevenants sont passibles de congédiement. Aucun fonctionnaire ne peut faire un travail à l'extérieur ou des affaires qui nuisent à ses fonctions, ou à l'égard desquels il jouit d'un avantage découlant de son emploi dans la fonction publique, ni avoir un travail à l'extérieur qui autrement constituerait un emploi à plein temps, ni exercer une profession qui risque d'influencer l'exercice de ses fonctions officielles. Le Premier ministre mentionnait des exemples, où un employé possédant des terrains ou des biens pourrait en influencer l'usage ou la valeur et où un fonctionnaire ou sa famille immédiate détient des intérêts dans une entreprise dont les affaires avec le gouvernement pourraient être influencées.

Chaque ministre est chargé de désigner les domaines particuliers de conflit pour ses fonctionnaires. Par exemple, la Commission des valeurs mobilières de l'Ontario a élaboré des règles sur les placements à l'intention de ses employés.

Le manuel de l'administration de l'Ontario dispose que le fonctionnaire doit, lorsqu'on le lui ordonne, se dessaisir d'un intérêt extérieur ou le transférer à une tierce partie neutre (fiducie sans droit de regard). L'expression "famille immédiate" n'est pas définie et il n'est pas question du conjoint, même si l'on peut supposer que le conjoint soit réputé faire partie de la famille immédiate.

Il n'y a aucune restriction proprement dite quant aux activités ultérieures des anciens titulaires de charges publiques; cependant, comme nous l'avons dit, les ministères et organismes peuvent imposer leurs propres restrictions. Ainsi, une commission interdit pendant douze mois à ses anciens empoyés de représenter d'autres personnes devant elle.

Les lignes directrices s'appliquent aux organismes de la Couronne.

Québec

Au Québec, la Loi sur la législature régit les conflits d'intérêts pour les députés à l'Assemblée nationale. En outre, le Premier ministre publiait en 1981 une directive aux ministres, aux adjoints parlementaires et aux fonctionnaires concernant l'acceptation de cadeaux.

La loi prévoit l'inégibilité d'un député qui accepte un paiement portant sur autre chose que ses frais licites, son traitement et ses allocations. Il y a certaines exceptions (par exemple, les honoraires reçus par un médecin pour des services aux assistés sociaux, etc.). Les députés ne peuvent passer des contrats d'affaires avec Sa Majesté ou le gouvernement du Québec, bien qu'ils puissent détenir des actions dans une société qui fait des affaires à contrat avec Sa Majesté ou avec le gouvernement du Québec, à l'exception d'une société qui effectue des travaux publics. Le député qui continue à siéger alors qu'il est inéligible en raison d'une infraction à cette loi risque une amende de 1 000 dollars par jour.

En 1981, le Premier ministre obligeait les ministres, par directive, à mettre un terme à toutes les activités professionnelles ou commerciales qui pouvaient être sources de conflits ou les empêcher de consacrer tout leur temps à leurs fonctions officielles. Ils doivent se dessaisir de leurs intérêts dans des sociétés dont les actions sont cotées en bourse ou s'échangent librement. Les ministres doivent s'assurer qu'ils ne détiennent pas, non plus que leur famille immédiate, des actions de sociétés qui font affaire avec le gouvernement du Québec ou en reçoivent des prêts ou des subventions. À titre exceptionnel, les ministres peuvent faire affaire avec le gouvernement à la condition qu'il n'y ait aucune dérogation à la directive. Le comité parlementaire sur la participation financière doit être informée des détails des contrats pour lesquels on demande une exception.

Compte tenu de la nature des fonctions d'un ministre, il peut être obligé, de même que sa famille, de se dessaisir de biens qui ne sont pas autrement interdits. Les ministres ont un délai de 60 jours s'ils se trouvent dans une telle situation qui s'est produite avant qu'ils ne deviennent ministres, ou s'ils se trouvent dans cette situation à cause d'un mariage, de l'application d'une loi ou par succession. Cela s'applique également, mutatis mutandis, à la famille immédiate du ministre.

Un ministre ou sa famille ne doivent pas acheter de terres à des fins de spéculation, ni acquérir un intérêt dans une propriété immobilière au Québec ou dans une société d'aménagement immobilier au Québec. Certaines exceptions sont permises, par exemple l'acquisition de terres à des fins agricoles. Les

ministres doivent déclarer chaque année en détail au Secrétaire général du Cabinet (conseil exécutif) leurs actions et celles de leurs conjoints et de leurs enfants mineurs, leurs placements financiers, leurs terrains, leurs immeubles (au Québec ou à l'extérieur) excepté leur résidence, le nom et les qualités de leurs créanciers, y compris la valeur de la dette dans certains cas, ainsi que les entreprises dans lesquelles ils détiennent un intérêt. Les déclarations du ministre sont à la disposition du public.

Le Premier ministre du Québec a également publié une directive sur les cadeaux à l'intention des ministres, des adjoints parlementaires et des fonctionnaires. Essentiellement, la directive ne permet d'accepter que des cadeaux d'une "valeur modeste" (moins de 25 dollars) lorsqu'il s'agit d'un cadeau personnel reçu lors d'un événement auquel participait le bénéficiaire. Tous les autres cadeaux doivent être remis au donateur ou envoyés, lorsque la chose est à-propos, au ministre des Affaires culturelles ou à celui des Travaux publics et des Approvisionnements.

Il n'y a aucune restriction quant à la période post-parlementaire pour les ministres et les adjoints parlementaires au Québec.

La Loi sur la fonction publique du Québec traite des conflits d'intérêts à l'article 99. En outre, il existe un Règlement sur les normes de conduite et de discipline dans la Fonction publique et le relevé provisoire des fonctions. En outre, les fonctionnaires sont soumis à la directive de 1975 du Premier ministre concernant l'acceptation des cadeaux, qui a pour effet de modifier le Règlement. Nous avons déjà présenté la substance de la directive de 1976 du Premier ministre.

Le Règlement vise toutes les personnes mentionnées à l'article 72 de la Loi sur la Fonction publique; l'inobservance des dispositions du Règlement équivaut à une faute disciplinaire. Selon le Règlement, le fonctionnaire doit s'acquitter de ses fonctions avec probité, d'une façon désintéressée et impartiale. Le Règlement est un "fourre-tout", car il traite également des heures de travail, des absences, de l'ivresse, du refus de travailler ou de l'incitation à refuser de travailler, de la négligence, du travail incorrect, de la désobéissance, et ainsi de suite.

Aucun fonctionnaire ne peut solliciter ou accepter un cadeau (mais voir la directive de 1976 du Premier ministre, qui s'applique également aux fonctionnaires), une récompense, une commission, un escompte, un prêt, une réduction de dette, une faveur ou un avantage; il ne doit pas non plus se servir à son profit ou pour son usage personnel de renseignements obtenus dans l'exercice de ses fonctions officielles.

Aucun fonctionnaire qui est un professionnel (c'est-à-dire le titulaire d'un poste exigeant au moins 16 années d'études) ne peut exercer sa profession si ce n'est pour le gouvernement du Québec. Le fonctionnaire doit révéler toute situation qui risque de créer un conflit d'intérêts. L'employeur lui indique alors les mesures à prendre. Un sous-ministre doit faire sa propre déclaration au Premier Ministre. Un fonctionnaire qui a l'intention de publier quoi que ce soit concernant le ministère où il travaille, ou de donner une entrevue de presse, doit d'abord en obtenir l'autorisation.

Selon l'article 99 de la Loi sur la fonction publique, aucun fonctionnaire ne peut détenir directement ou indirectement un intérêt dans une activité commerciale qui vient en conflit avec ses fonctions officielles, sous peine de révocation. La révocation est évitée si l'intérêt est acquis par héritage ou à titre de don inconditionnel, pourvu que le fonctionnaire s'en dessaisisse sans retard. Il en est de même dans le cas d'une affectation, d'une promotion ou d'une mutation si le fonctionnaire y renonce sans retard.

Les sanctions disciplinaires prévues pour les infractions sont la réprimande, la suspension ou le congédiement. Un fonctionnaire peut également être relevé temporairement de ses fonctions, avec ou sans traitement, s'il est soupçonné d'une infraction grave ou d'une infraction criminelle ou si une situation d'urgence exige une telle mesure. Cependant, cette suspension temporaire est considérée, jusqu'à ce que la situation soit tirée au clair, comme une mesure administrative et non comme une sanction. Le salaire peut être versé rétroactivement plus tard. Le conjoint et les enfants mineurs ne sont pas mentionnés. Il n'y a aucune restriction à l'égard de l'après-mandat.

Au moment de la rédaction, l'Assemblée nationale venait d'être saisie d'un projet de loi traitant en profondeur de la fonction publique du Québec.

Nouveau-Brunswick

La Loi sur les conflits d'intérêts (1978) du Nouveau-Brunswick régit la conduite du Conseil exécutif (les ministres), des sous-ministres, des députés, des présidents des sociétés de la Couronne et des adjoints ministériels.

Un député ne peut occuper un poste ni recevoir une rétribution du gouvernement du Nouveau-Brunswick. Il ne peut occuper à plein temps un poste du gouvernement du Canada ni détenir, à titre d'actionnaire ou autrement, un contrat ou une convention avec Sa Majesté ou avec tout fonctionnaire, ministère ou organisme relativement à la fonction publique de la province, ou aux termes duquel des deniers publics de la province sont alloués (sous réserve de certaines exceptions, notamment le fait

de recevoir une pension de retraite, des prestations de vieillesse, ou une somme qu'une loi permet d'offrir au public en général ou à un groupe en particulier). Il ne peut être caution ou garant de toute personne qui est partie à un contrat avec le gouvernement du Nouveau-Brunswick. Certaines activités et certains emplois extérieurs à l'Assemblée lui sont permis (par exemple, notaire, juge de paix, coroner, membre des forces armées de Sa Majesté, etc.), et il peut également accepter un traitement ou un avantage d'un parti politique enregistré dont il est membre.

Les ministres, qui sont soumis aux mêmes restrictions et interdictions que les députés, ne peuvent poursuivre une autre activité professionnelle que celle de ministre, sauf si le juge désigné en vertu de la loi en décide autrement. Un ministre ne peut non plus accepter d'honoraires, de dons, de gratifications et d'autres avantages qui pourraient influencer ses décisions. Un ministre ne peut avoir, à quelque niveau que ce soit, un poste ou des fonctions susceptibles d'entraver ses fonctions et ses responsabilités de ministre.

Les membres du personnel des ministres sont régis, mutatis mutandis, par les mêmes restrictions et interdictions, de même que les sous-ministres et les présidents des sociétés de la Couronne.

Tous les groupes visés par la loi, à l'exception des députés, peuvent, dans des circonstances nettement définies à l'article 6, participer à certains contrats avec le gouvernement du Nouveau-Brunswick, nonobstant les autres dispositions de la Loi.

En vertu de la loi, les députés, ministres, sous-ministres, sous-chefs et chefs d'organismes, présidents de sociétés de la Couronne et adjoints ministériels doivent divulguer sous serment à un juge de la Cour du banc de la Reine du Nouveau-Brunswick toute information portant sur les biens immeubles ou personnels ainsi que sur les activités commerciales ou entreprises financières qu'eux-mêmes ou leurs conjoints ou enfants à charge possèdent ou dans lesquelles ils ont des intérêts (sous réserve de certaines exceptions visant des biens personnels et des biens placés dans une fiducie sans droit de regard). Le juge doit examiner les divulgations et peut faire enquête.

Le juge désigné doit faire un rapport chaque fois qu'une personne affirme sous serment qu'il y a infraction aux dispositions de la loi. Si le juge constate l'existence d'un conflit d'intérêts, il doit ordonner à la personne en cause de se soumettre à une ordonnance visant à corriger la situation (par dessaisissement, remise d'un gain, démission ou autrement). Les infractions à la loi sont passibles d'une amende pouvant aller jusqu'à 10 000 dollars ou d'une peine d'emprisonnement ne dépassant pas une année. En outre, la cour peut interdire à

l'intéressé d'exercer des fonctions ou d'occuper un poste pour une durée prescrite. La loi ne comporte aucune restriction aux activités post-parlementaires.

Pour ce qui est de la fonction publique, on aura remarqué que les sous-ministres et les présidents des sociétés de la Couronne sont régis par la Loi sur les conflits d'intérêts (1978). Pour la fonction publique du Nouveau-Brunswick, une politique sur les conflits d'intérêts a été énoncée en 1981. Elle se fonde sur la règle générale qu'un employé ne doit pas participer à des affaires ou à des transactions de nature financière ou personnelle qui pourraient nuire à l'exécution juste et honnête de ses fonctions officielles. Le fonctionnaire doit s'engager à respecter les principes de la politique sur les conflits d'intérêts comme condition d'emploi, il ne doit pas y avoir de conflit, réel ou apparent, entre ses intérêts et sa responsabilité envers le public. La politique interdit de conférer un avantage à l'employé ou à ses parents, amis ou associés, de révéler des renseignements confidentiels, d'accepter une récompense, un don ou une faveur ou d'utiliser les biens ou les terres de l'employeur à des fins non officielles.

Certains fonctionnaires peuvent aussi être obligés de faire une divulgation sous serment de leurs intérêts commerciaux ou financiers ainsi que de ceux de leurs conjoints et de leurs enfants à charge, à l'exception de certains biens personnels (résidence principale, automobile, effets ménagers, certificats de fiducie et certificats bancaires). La divulgation est déposée, à titre confidentiel, au Bureau exécutif supérieur.

Compte tenu de ses tâches, il peut être interdit à un fonctionnaire d'occuper un emploi extérieur qui serait incompatible avec l'intérêt public. Il doit donc obtenir une approbation avant de songer à un emploi à l'extérieur.

Les infractions sont passibles de mesures disciplinaires, y compris le congédiement. Il n'y a aucune restriction quant aux activités ultérieures à l'emploi. La politique s'applique aux sociétés de la Couronne.

Nouvelle-Écosse

Pour ce qui est des titulaires élus de charges publiques, la "House of Assembly Act" dispose, à l'article 21, qu'aucune personne qui détient un poste rémunéré au service du gouvernement du Canada ou du gouvernement de la Nouvelle-Écosse n'est éligible à être député.

L'article 22 de cette loi stipule que, sauf dispositions contraires de la loi, aucune personne qui détient, possède, entreprend ou exécute, directement ou indirectement, seule ou avec quelqu'un d'autre, par elle-même ou par l'entremise d'un

fiduciaire ou d'une tierce partie, un contrat ou une convention avec le gouvernement de la Nouvelle-Écosse, ou avec un ministre ou ministère du gouvernement, à l'égard duquel des deniers publics de la Nouvelle-Écosse doivent être versés pour un service, un travail, une affaire ou une chose, n'est éligible à être député ou à siéger ou voter à l'assemblée.

Comme dans les autres provinces, les interdictions générales sont assorties d'un certain nombre d'exceptions. Ainsi, un député peut, sans devenir inéligible, être membre des Forces armées, recevoir une pension ou une allocation à la suite d'une invalidité subie en temps de guerre, être juge de paix, magistrat appointé, notaire public, commissaire à l'assermentation, procureur, coroner, exécuteur, administrateur ou fiduciaire; il peut détenir des actions dans une société incorporée qui détient un contrat ou une convention (avec le gouvernement de la Nouvelle-Écosse) sauf à l'égard de travaux publics; il peut être entrepreneur pour un prêt en argent au gouvernement de la Nouvelle-Écosse ou avoir des intérêts dans ce journal; il peut être propriétaire d'un journal où sont publiées des annonces officielles du gouvernement de la Nouvelle-Écosse ou avoir des intérêts dans ce journal; il peut être caution pour un titulaire de charge publique, faire partie d'un comité ou d'une commission médicale d'un hôpital, être partie à un contrat ou une convention de nature occasionnelle pour la fourniture d'un travail et être un employé temporaire ou à temps partiel des gouvernements du Canada et de la Nouvelle-Écosse lorsque des qualités particulières sont requises.

La peine pour un député qui siège alors qu'il est inéligible est de 1 000 dollars par jour, recouvrable par l'entremise de la Cour suprême de la Nouvelle-Écosse. L'abus de confiance, visé à la partie III de la loi, est passible d'une peine de cinq ans de prison.

Un député enfreint la loi s'il accepte un pot-de-vin visant à l'influencer; il est alors passible d'emprisonnement pendant que siège la Chambre, en plus de toute autre sanction dont il est passible en droit.

Aucun député, ni aucun avocat associé à un député, ne peut accepter ou recevoir, directement ou indirectement, un honoraire ou une récompense pour avoir favorisé un projet de loi ou une résolution à la Chambre, sous peine d'une amende de 200 dollars, en plus de l'honoraire ou de la récompense reçu.

Cette loi ne comporte aucune disposition visant la divulgation ou le dessaisissement, aucune mention du conjoint ou de la famille immédiate ni aucune restriction quant aux activités post-parlementaires.

La "Public Service Act" de la Nouvelle-Écosse ne mentionne pas les conflits d'intérêts, ni directement ni indirectement. L'article 35 de la "Civil Service Act" permet aux fonctionnaires qui ne sont pas désignés au règlement afférent d'être élus à des fonctions municipales ou à une commission scolaire, si ce poste ne nuit pas à l'exécution de leurs fonctions et ne vient pas en conflit avec les intérêts de Sa Majesté.

Île-du-Prince-Édouard

Selon la "Legislative Assembly Act" de l'Île-du-Prince-Édouard, quiconque détient un poste rémunéré du gouvernement du Canada ou de l'Île-du-Prince-Édouard est inéligible à être député. Cependant, un député peut être instituteur, membre des Forces armées ou membre du conseil d'administration de certains hôpitaux et il peut détenir des actions de toute société. Il ne peut, directement ou indirectement, détenir un contrat ou une convention avec Sa Majesté stipulant que des deniers publics sont versés pour un service ou un travail. Il ne peut non plus être garant d'un tel contrat. La sanction prévue est l'inégibilité. Si un député siège alors qu'il est inéligible, il est passible d'une amende de 250 dollars par jour.

La "Civil Service Act" de l'Île-du-Prince-Édouard ne traite pas directement des conflits d'intérêts. Toutefois, selon le serment d'office, le fonctionnaire ne doit pas demander ou recevoir de l'argent, des services ou une quelconque récompense, si ce n'est son salaire prévu par la loi. À deux reprises, le gouvernement a tenté d'incorporer des dispositions visant les conflits d'intérêts dans la législation, mais le projet de loi n'a pas été adopté. On nous a informé qu'un comité de l'assemblée étudiait la question. Il n'y a aucune disposition concernant la divulgation ou le dessaisissement, aucune restriction quant aux emplois ultérieurs, ni aucune mention de la famille des fonctionnaires dans les rares règles qui existent. Le gouvernement n'a pas imposé de lignes directrices sur les conflits d'intérêts aux sociétés de la Couronne.

Terre-Neuve

Les ministres de Terre-Neuve sont régis par les lignes directrices de 1983 (Conflict of Interest [Ministers] Guidelines) en vertu du "Conflict of Interest Act" de 1973. Les adjoints parlementaires, les adjoints spéciaux du Premier ministre et les secrétaires parlementaires des ministres sont également régis par les lignes directrices (NewFoundland Regulation-310/82).

Selon les lignes directrices, un ministre ne doit pas se servir de ses fonctions pour obtenir un accès préférentiel à des avantages du gouvernement, il ne doit pas détenir d'actions dans une société, avoir un intérêt dans une association quelconque qui s'occupe d'exploration pétrolière et gazière, se livrer à

l'exploration minière ou à la spéculation immobilière, ni procéder à des spéculations immobilières en son propre nom. Tout intérêt de ce genre doit être divulgué au Premier ministre. La divulgation s'applique également aux intérêts du conjoint et des enfants mineurs du ministre.

Ainsi un ministre: ne peut utiliser à des fins personnelles des renseignements obtenus à titre privilégié; ne peut détenir aucun emploi, aucune charge, ni aucun poste, y compris un emploi à son propre compte, qui puisse venir en conflit avec l'exécution de ses fonctions officielles; ne doit pas se laisser influencer dans l'exécution de ses fonctions par les emplois qu'il compte obtenir à l'avenir; doit refuser d'exercer des fonctions de régie ou d'inspection ou des fonctions discrétionnaires pour toute question l'impliquant ou impliquant un parent, y compris des contrats, des octrois et des baux visant des terrains ou une aide financière à des fins commerciales par voie de subventions, de prêts, de garanties ou de subsides; doit divulguer le cas échéant son association active à des groupes de pression et doit refuser de participer à toute décision gouvernementale concernant ces groupes; et ne peut accepter un don, une faveur ou un service de personnes qui traitent avec le gouvernement. Dans une situation particulière, le Premier ministre peut exiger qu'un ministre, son conjoint ou ses enfants mineurs se dessaisissent de certains biens ou les placent dans une fiducie appprouvée. Les lignes directrices s'appliquent au ministre, à son conjoint et à ses enfants mineurs pendant un an après la fin du mandat du ministre.

Le "Conflict of Interest (Public Employees) Regulations", règlement adopté en 1982 en vertu de la "Conflict of Interest Act", exige la divulgation des intérêts commerciaux, financiers ou immobiliers d'un fonctionnaire, de son conjoint et de ses enfants mineurs ainsi que de toute personne parente au premier degré par mariage, adoption ou consanguinité de ce fonctionnaire ou de son conjoint. Un fonctionnaire ne doit pas, sans la permission de son sous-ministre, participer à une mesure officielle concernant un intérêt divulgué ou à divulguer.

Un fonctionnaire, ou son conjoint ou ses enfants mineurs, ne peut, pendant la durée de son emploi et pendant un an par la suite, détenir un contrat gouvernemental relatif au ministère ou à l'organisme où il a été employé en dernier lieu.

La spéculation immobilière, l'exploration pétrolière et gazière dans les zones réglementées et l'exploration minière sont interdites.

Un fonctionnaire: ne peut utiliser des renseignements obtenus dans l'exercise de ses fonctions à des fins personnelles; ne peut détenir un emploi, une charge ou un poste à l'extérieur, ni travailler à son propre compte, si cela peut venir en conflit

avec l'exécution de ses fonctions officielles ou y nuire; ne doit pas se laisser influencer dans l'exercice de ses fonctions officielles par ses projets d'emploi ou par les offres d'emploi qu'il a reçues; et doit se récuser dans certains cas où il risquerait, en participant à une action ou en exerçant une fonction, d'accorder un traitement de faveur, et doit en faire rapport au sous-ministre.

Le sous-ministre a le pouvoir d'exiger que le fonctionnaire (ou son conjoint et ses enfants mineurs) se dessaisisse de certains biens ou mette fin à un emploi à l'extérieur. Il peut également muter le fonctionnaire, lui imposer des sanctions ou recommander sa révocation.

Les sociétés de la Couronne sont soumises au règlement.

Yukon

À ce jour, seuls les membres du conseil exécutif (les ministres) sont assujettis à un code écrit. Il n'y a aucune loi. Le "Executive Council Code of Conduct Regarding Conflict of Interest" a été déposé après une déclaration à la législature par le leader du gouvernement, M. Pearson, en avril 1981. Bien que le code s'applique également au conjoint et aux personnes à charge habitant avec le ministre, il ne s'applique pas aux députés. Le code dégage trois domaines principaux: 1) les contrats avec le gouvernement du Yukon, 2) les activités commerciales et professionnelles au Yukon et 3) les intérêts financiers et les postes dans des sociétés et organismes du Yukon. L'objectif principal est d'appliquer ce que le leader du gouvernement a appelé la règle d'interdiction des contrats, qui empêche les ministres et leur famille (selon la définition donnée ci-dessus) de détenir des contrats avec le gouvernement du Yukon, sauf dans quelques situations bien définies.

Un ministre doit divulguer chaque année les biens et les intérêts commerciaux et financiers détenus par lui et par sa famille, y compris les postes que détiennent les membres de sa famille dans de telles entreprises. La seule mention précise du dessaisissement vise les contrats en vigueur avec le gouvernement du Yukon que détient toujours le ministre, ou sa famille, à la fin des six mois qui suivent la nomination du ministre au conseil exécutif.

Aucun ministre ou député, ou sa famille, ne peut acheter de terres du gouvernement du Yukon ni lui en vendre, si ce n'est en cas d'expropriation ou sur approbation du prix par un juge de la Cour suprême.

Aucun membre de la famille du ministre ne peut occuper un poste dans l'administration du ministre. Une déclaration doit être déposée chaque année, précisant les membres de la famille du

ministre qui sont employés par le gouvernement du Yukon et le poste qu'ils détiennent.

Il n'est pas interdit aux ministres de détenir un emploi à l'extérieur, ou de se livrer à une activité commerciale ou professionnelle s'il n'y a pas de conflit apparent et à la condition que cette occupation extérieure ne soit pas de nature quotidienne et n'entrave pas l'exercice de leurs fonctions. (La déclaration du leader du gouvernement laisse entendre que cette exception à la règle générale vise surtout l'exploitation d'une entreprise familiale).

Le code ne comporte aucune restriction quant à la période post-parlementaire.

La fonction publique du Yukon est régie par la directive 1/39 du gouvernement du Yukon, appelée "Public Service Conflict of Interest Guidelines" (1978). En outre, l'article 194 de l'Ordonnance sur la Commission de la fonction publique traite des contrats. Les lignes directrices obligent les fonctionnaires à ne pas se placer dans une situation où ils pourraient être en reste envers une personne qui pourrait tirer profit d'un traitement de faveur. Les fonctionnaires ne devraient pas avoir d'intérêts financiers qui puissent venir en conflit avec l'exercice de leurs fonctions officielles, et il ne devrait y avoir aucun conflit réel ou apparent entre les intérêts privés du fonctionnaire et ses fonctions officielles. À sa nomination, le fonctionnaire devrait arranger ses affaires de façon à empêcher les conflits d'intérêts. Il doit prendre soin, dans la gestion de ses affaires, de ne pas profiter (ou sembler profiter) de renseignements officiels.

Un fonctionnaire ne devrait pas se placer en situation de tirer des avantages directs ou indirects de contrats gouvernementaux. Aucun fonctionnaire ne peut directement, en son propre nom ou par l'entremise d'une autre personne, présenter une offre, accepter ou signer un contrat avec le territoire. (Cet article des lignes directrices est libellé dans les mêmes termes que l'article 194 de l'Ordonnance sur la Commission de la Fonction publique.)

Il est interdit aux fonctionnaires de détenir une charge ou un emploi dont les exigences puissent être incompatibles avec leurs fonctions. Le fonctionnaire ne doit pas accorder un traitement de faveur à ses parents, à ses amis ou aux organismes avec lesquels il est associé. Il doit divulguer tous ses intérêts commerciaux ou financiers qui pourraient s'interpréter comme laissant prise à un conflit réel ou éventuel, ainsi que tout conflit d'intérêts possible découlant de ses activités extérieures à la fonction publique. Il doit se conformer aux conseils de son sous-ministre à l'égard des conflits d'intérêts.

Les sous-ministres sont en outre tenus de se conformer scrupuleusement à la loi, de façon que leurs actes puissent subir l'examen le plus minutieux.

Il n'y a aucune restriction quant à l'après-mandat.

Territoires du Nord-Ouest

L'Ordonnance de 1970 du conseil traite, à l'article 16.1, des conflits d'intérêts.

Un membre du conseil territorial (la législature) doit divulguer ses intérêts pécuniaires, directs ou indirects, dans toute affaire dont est saisi le conseil des Territoires du Nord-Ouest. Cette divulgation est enregistrée au procès-verbal du conseil (et est donc publique). Doivent également être divulgués les intérêts d'un conjoint à charge, d'un fils, d'une fille ou d'un autre parent qui a le même domicile. Il y a certaines exceptions mineures.

Un membre du conseil est considéré avoir un intérêt pécuniaire indirect dans toute affaire dont le conseil est saisi s'il est lui-même (ou par l'entremise d'un mandataire) actionnaire, administrateur ou cadre supérieur d'une société privée; s'il détient le contrôle (10% des droits de vote) ou est administrateur ou cadre supérieur d'une société publique; s'il est membre d'un organisme qui a un intérêt pécuniaire dans cette affaire ou s'il est l'associé ou l'employé d'une personne qui y détient un intérêt pécuniaire.

Un membre qui contrevient à l'article 16.1, à moins que ce ne soit par inadvertance ou qu'il s'agisse d'une erreur de bonne foi, peut être disqualifié par un tribunal et se voir imposer une amende ne dépassant pas 5 000 dollars. L'article ne mentionne pas explicitement le dessaisissement, mais cela est implicite dans le libellé. Il n'y a aucune restriction quant à la période post-parlementaire.

Le gouvernement des Territoires du Nord-Ouest s'est occupé des conflits d'intérêts dans la fonction publique et les sociétés de la Couronne de trois façons: par l'article 49 du Règlement (de 1967) formulé en vertu de l'Ordonnance sur la fonction publique, par la directive sur les conflits d'intérêts (manuel du personnel 1983) et par les dispositions de deux conventions collectives.

Le Règlement est très bref. Les deux conventions collectives sont celles de l'Association de la fonction publique et de l'Association des enseignants. Ces deux conventions comportent des dispositions dont le but est similaire et reconnaissent que certaines formes d'emploi à l'extérieur ne sont pas souhaitables. En outre, chacune des conventions oblige les

employés à aviser l'employeur (le gouvernement) de la nature de ces emplois extérieurs.

La directive de 1983 sur les conflits d'intérêts semble s'appliquer de façon universelle, malgré le texte des deux conventions collectives. Elle ne s'applique pas expressément à la famille du fonctionnaire.

En vertu de cette directive, aucun employé ne peut faire des affaires ou avoir un emploi à l'extérieur de la fonction publique si cela peut susciter un conflit d'intérêts. Un fonctionnaire ne peut non plus exploiter une entreprise dans le cadre de laquelle il exploite indûment pour son profit personnel ses relations avec d'autres fonctionnaires. Aucun fonctionnaire ne doit demander ou accepter un paiement ou un avantage pour des services qui font partie de ses fonctions publiques.

Un cadre supérieur (ce terme est défini) doit convenir, d'après la directive, que pendant une période d'un an après son emploi, il n'utilisera pas les connaissances et l'information obtenues alors qu'il était fonctionnaire pour entraîner une perte pour le gouvernement des Territoires du Nord-Ouest ou un avantage pour lui-même. Au cours de cette même période, il peut lui être interdit d'acheter ou d'obtenir un intérêt dans une certaine activité commerciale (définie expressément par rapport à lui). En outre, il peut être obligé de s'engager à ne pas exploiter un certain genre de commerce ni à y être employé. La directive dispose qu'aucun cadre supérieur ne peut être cadre supérieur ou détenir un poste d'administrateur ou de dirigeant dans une société qui détient un contrat (rémunéré) avec Sa Majesté ou avec le Commissaire des Territoires du Nord-Ouest.

Les fonctionnaires de rang inférieur ne sont pas obligés de signer un tel engagement et il n'y a donc pour eux aucune restriction quant aux emplois ultérieurs.

c) Palier municipal

C'est au palier municipal que l'on rencontre au Canada la plus grande somme de lois et de jurisprudence à l'égard des questions de conflits d'intérêts. La législation de chaque province et des deux territoires à l'égard des municipalités contient depuis de nombreuses années des dispositions portant sur l'éthique professionnelle des représentants élus; dernièrement, on élabore des règles à l'intention des fonctionnaires municipaux.

Les dispositions législatives régissant les problèmes de conflits pécuniaires, dans le cas de l'Ontario par exemple, remontent à la première loi municipale globale adoptée en 1849 (la Loi Baldwin), qui disposait ce qui suit:

> Aucune personne qui reçoit une allocation du canton, du comté, du village, de la ville ou de la cité (sauf à titre de conseiller ou à titre connexe) ni aucune personne qui détient par elle-même ou par l'entremise d'un associé un intérêt ou une action dans tout contrat passé avec le canton, le comté, le village, la ville ou la cité où elle habite n'est compétente à être élue ou à siéger comme échevin ou conseiller pour cette municipalité ou pour un de ses quartiers.

De nos jours, un certain nombre de provinces ont choisi d'adopter des lois distinctes pour régir les problèmes de conflits d'intérêts au palier municipal, notamment la "Act to prevent Conflict of Interest in the Conduct of Municipal Government", adoptée en Nouvelle-Écosse en 1982, la Loi sur la corruption municipale de la province de Québec, la "Municipal Council Conflict of Interest Act" adoptée en 1983 en Ontario, la "Municipal Council Conflict of Interest Act" adoptée en 1983 au Manitoba. Dans les autres provinces, les dispositions à cet égard figurent à la Loi sur les municipalités ou dans un texte semblable.

En général, ces dispositions portent sur la conduite des membres des conseils municipaux, leur imposant de divulguer des intérêts en conflit à l'égard des affaires dont le conseil est saisi et leur interdisant de prendre la parole ou de voter à l'égard des affaires auxquelles ils sont financièrement intéressés. Dans certains cas, les lois sont très détaillées, par exemple la "Municipal Conflict of Interest Act" de l'Ontario qui dispose que les intérêts pécuniaires, directs ou indirects, d'un parent ou d'un conjoint ou d'un enfant du membre du conseil doivent, s'ils sont connus du membre, être réputés également être des intérêts pécuniaires dudit membre; en outre, la définition de "conjoint" vise également une union de fait qui dure depuis au moins cinq ans.

Lorsque nous avons étudié les règles sur les conflits d'intérêts aux paliers fédéral, provincial et territorial, nous avons décrit les règles applicables aux députés, puisque ces règles établissent des normes minimales auxquelles les ministres et les secrétaires parlementaires doivent se conformer. Par ailleurs, les règles d'éthique pour les députés ne font pas partie de notre mandat. Au palier municipal, il n'y a évidemment aucun parallèle exact, et c'est pourquoi nous ne traiterons pas en détail des règles sur les conflits d'intérêts touchant les représentants municipaux élus.

Nous désirons cependant formuler deux remarques à la suite de notre étude des dispositions portant sur les conflits d'intérêts au palier municipal au Canada. En premier lieu, il est manifeste d'après les dispositions adoptées par la plupart des législatures provinciales à cet égard que les problèmes de

conflits d'intérêts au palier municipal suscitent une profonde inquiétude. Il semble que le risque de problèmes au palier municipal soit élevé compte tenu du grand nombre de questions très précises dont les conseils locaux doivent s'occuper (licences, zonage, permis de construction et d'aménagement) et qui peuvent donner lieu à des efforts concertés de la part des parties intéressées pour influencer les membres du conseil. À cela s'ajoute le fait que de nombreux conseillers abordent leurs fonctions presque sans expérience politique et peuvent ne pas être au courant des pièges qu'il faut éviter lorsque l'on traite avec des parties intéressées. En outre, les conseillers municipaux, dans la plupart des localités, ont d'autres emplois, entreprises ou activités professionnelles de sorte qu'en plus de leur travail à temps partiel au conseil, ils ont un intérêt permanent dans les activités commerciales de la communauté. Ces facteurs suscitent un certain nombre de possibilités de conflits d'intérêts et les législatures provinciales ont jugé à-propos de prévoir un cadre juridique assez précis pour la conduite des titulaires élus de charges municipales.

En second lieu, l'existence d'un grand nombre de lois sur les conflits d'intérêts, avec le temps, a donné lieu à une jurisprudence importante. Cette jurisprudence contient quelques principes généraux dont il semble à-propos de tenir compte dans le cadre du présent rapport et des recommandations qu'il contient.

On a énoncé comme suit la justification des règles régissant la conduite des officiers municipaux tant en "common law" qu'en vertu des diverses lois provinciales: le principe simple de la justice, que personne ne peut être juge dans sa propre cause, informe tous les secteurs du droit et est aussi vieux que le droit lui-même.[1]

Les restrictions à l'éligibilité aux charges municipales et à la participation aux affaires du gouvernement municipal partent du principe que ceux qui ont un intérêt personnel à une affaire donnée peuvent être incapables d'agir d'une façon complètement objective à cet égard. En d'autres termes, il risque d'y avoir un préjugé chez la personne qui, pour une raison ou pour une autre, est intéressée à l'issue de l'affaire. On trouvera plus loin une définition précise de ce qui constitue un intérêt à cet égard et de la portée des restrictions imposées aux titulaires de charges publiques.

On reconnaît depuis longtemps que le préjugé dans le processus judiciaire est contraire aux principes de la justice naturelle:

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1 Paley on Summary Convictions, 7e éd., p. 43 cité par C. Boyd, in Re: l'Abbé and the Corporation of Blind River (1904) 7.O.L.R. 230 (Ont. Div. Ct.) p. 231.

> Dans l'administration de la justice, soit par une cour de justice reconnue ou par des personnes qui, sans constituer une cour de justice, exercent des fonctions similaires, la politique publique exige, pour qu'il n'y ait aucun doute quant à l'intégrité de l'administration, que toute personne qui y participe ne soit pas placée dans une situation telle qu'on puisse la soupçonner de préjugé[2].

Les mêmes principes s'appliquent au gouvernement. La probabilité qu'un titulaire de charge publique, particulièrement au palier local, soit placé dans une situation de conflit est en soi très grande et inévitable. Les décisions quant à l'utilisation des terrains, aux permis d'exploitation et à l'emprise des routes sont prises par ceux qui sont les plus près de l'affaire. Il est inévitable que des représentants locaux aient un intérêt personnel dans certaines affaires dont ils sont saisis. Dans de nombreuses juridictions, la possibilité de préjugé est reconnue par des lois dont l'objet est d'empêcher le conflit entre l'intérêt et le devoir qui ne peut manquer de se produire.[3]

En même temps, on a reconnu qu'il ne faut pas sans raison restreindre l'accès aux charges publiques:

> Le droit d'être choisi pour représenter ses pairs dans un organisme représentatif, un Parlement, une législature, un conseil municipal est une des possessions les plus chères de l'homme libre et l'on ne devrait pas la lui enlever sans une disposition précise d'une loi.[4]

D'ordinaire, les membres des conseils municipaux doivent divulguer leurs intérêts et s'abstenir de participer à l'étude d'affaires dont le conseil est saisi lorsque leurs intérêts peuvent être en cause. L'objet de la législation dans ce domaine est de favoriser l'objectivité de la prise des décisions et non pas d'assurer que les représentants votent contre leurs propres intérêts:

> L'objet (de la loi) est manifestement d'empêcher les conseillers de voter sur une affaire qui peut avoir une incidence sur leurs propres affaires et donc, influencer

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2 Lord Esher, M.R. Allinson v. General Council of Medical Education and Registration, (1894), Q.B. 750, p. 758.

3. Nutton v. Wilson (1889), 22Q.B.D. 774, p. 748.

4 Rex ex rel. Scroggie v. Robb (1925), 57 O.L.R.23, p. 25.

> leur jugement; le jugement d'un conseiller peut être influencée par une proposition visant à préserver sa responsabilité tout autant que par une proposition visant à y mettre fin, surtout lorsque d'autres personnes dans la même situation sont soustraites à cette même responsabilité.[5]

Ainsi, un conseiller municipal ne peut se défendre en affirmant qu'il n'était pas motivé par le désir de favoriser ses propres intérêts, car ce n'est pas là ce qu'on exige des titulaires de charges publiques:

> Ce n'est donc pas un moyen de défense, pour un conseiller municipal, de voter pour ou contre la question. Il peut avoir voté dans le sens de son intérêt ou il peut avoir fait l'effort de voter en sens contraire. Cette dernière façon de faire peut être acceptable au plan moral, mais cela n'assure pas l'étude désintéressée du fond de la question à laquelle l'électeur est en droit de s'attendre de la part de ses représentants et que la loi ordonne.[6]

De même, la législation dans ce domaine ne vise pas à punir la corruption des titulaires de charges publiques et elle n'entre pas en ligne de compte uniquement en cas de corruption. La législation tente plutôt de garantir l'ouverture dans la conduite des affaires municipales.

> Il n'est pas nécessaire de constater la corruption de la part du conseiller ou une perte réelle de la part du conseil. Dans la mesure où le membre ne respecte pas la norme de conduite prescrite par la loi, quelle que soit sa bonne foi ou la valeur de son motif, il contrevient à la loi.[7]

Bon nombre de lois comportent des clauses d'exception relatives à une erreur de jugement de bonne foi de la part du conseiller. Cela ne permet cependant pas une défense générale de bonne foi.

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5 Brown v. Director of Public Prosecutions (1956) 2All E.R. 189 (Q.B.), p. 192.

6 Re. Guimond and Sornberger (1980), 115 D.L.R. (3d) 321, Alta, C.A.) p. 330. Voir aussi Beaulieu c. Brisson (1948), C.S. 447; Guibord c. Dallaire (1931), 50 B.R. 440.

7 Re Moll and Fisher (1979), 97 D.L.R. (3d) 506 (Ont. Div. Ct.), p. 509.

En plus d'imposer la divulgation des intérêts personnels et certaines restrictions à la participation aux affaires municipales, certaines lois interdisent également aux représentants locaux de s'engager par contrat envers la corporation municipale dont ils sont membres. Un tel contrat serait en soi suspect car il impliquerait un conflit entre le devoir public et l'intérêt privé. Ainsi, les entrepreneurs auprès des municipalités sont souvent inéligibles aux charges municipales.[8]

La législation, non plus que le "common law", ne saurait viser tous les risques de préjugé. Il arrive souvent que l'on soit élu uniquement à cause de l'intérêt qu'on porte à certains dossiers. On reconnaît qu'il s'agit là d'un caractère nécessaire de la démocratie dont le droit ne devrait pas s'occuper:

> Le candidat à une charge doit nécessairement se prononcer sur des questions jugées d'intérêt public; la force avec laquelle il exprime ses opinions, et même l'étroitesse de son point de vue, peuvent attirer les électeurs. C'est là une partie intégrante du processus démocratique sur lequel se fonde le gouvernement municipal. Une fois le candidat élu, s'il ne maintient pas les opinions qu'il a exprimées publiquement, il pourrait s'attirer la méfiance du public et même susciter un certain cynisme à l'égard du processus démocratique. Ce sont là, à mon avis, des facteurs de première importance dont il faut tenir compte lorsque l'on juge le préjugé chez les membres d'un conseil municipal.[9]

Ainsi, la législation qui vise à restreindre la participation aux affaires municipales par les parties intéressées et à restreindre en général l'éligibilité aux charges locales a uniquement pour objet d'assurer que les affaires dont sont saisis les conseils municipaux sont étudiées sur le fond d'une façon désintéressée. Elle ne tente pas d'empêcher les candidats d'avoir des opinions fermes au sujet de questions municipales sur lesquelles leurs intérêts matériels n'ont pas prise.

d) Royaume-Uni

Au Royaume-Uni, on s'en est en général remis aux règles tacites et aux coutumes pour éviter les conflits d'intérêts. Les

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8 Marcoux c. Plante, (1976) B.R. Qué. 742, arrêt rendu en vertu de la Loi sur la fraude et la corruption dans les affaires municipales, S.R.Q. 1941, c. 214

9 Re. Campeau Corporation and the City of Calgary (1980), 112, D.L.R. (3d) 737 (Alta. C.A.) p. 751.

députés ne sont pas soumis à des restrictions importantes à l'égard des emplois extérieurs ou des intérêts commerciaux et, à la différence des États-Unis, ne sont pas régis par un code de conduite global. Comme on l'a signalé à l'égard de la démarche britannique: "Ce n'est que pour éviter les pratiques les moins honorables que le Parlement a jugé bon d'adopter des résolutions ou d'établir des règlements. Mais même ces règlements ne sont pas très complets et dans de nombreux cas, on a délibérément évité toute précision.10

Cependant, il faut aussi signaler qu'il existe au Royaume-Uni une longue tradition selon laquelle on s'occupe étape par étape des conflits d'intérêts. Par exemple, une résolution de la Chambre des communes en date du 2 mai 1685 définit l'acceptation d'un pot-de-vin par un député comme un manquement et un crime. De même, les règles à l'égard des autres formes de conflits d'intérêts ont été élaborées avec les années et se sont ajoutées à la tradition parlementaire britannique. À cet égard, la démarche anglaise à l'égard des conflits d'intérêts est analogue au "common law".

La différence d'approche entre le Royaume-Uni et les États-Unis tient en grande partie au fait que tant la politique que la bureaucratie sont davantage une carrière au Royaume-Uni. Cette différence a été expliquée comme suit:

> Du fait des liens étroits entre le gouvernement et le Parlement en Grande-Bretagne et de la doctrine de la responsabilité ministérielle envers le Parlement, les ministres ont tendance à être également des politiciens de carrière. À la différence de ce qui se fait aux États-Unis, il ne s'agit pas d'ordinaire de personnes provenant du monde des affaires ou de l'industrie, par exemple, qui se joignent à un gouvernement pour la durée de son mandat avec l'intention de retourner à leur carrière extra-gouvernementale à la fin de ce mandat.
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> L'isolement des politiciens de carrière en Grande-Bretagne n'est toutefois pas total parce qu'on s'attend à ce que les députés aient des carrières extra-parlementaires pour suppléer à leur revenu.11

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10 L'Honorable Allan J. MacEachen, Président du Conseil privé, Les membres du Parlement et les conflits d'intérêts. (Juillet 1973), Ottawa, p. 11.

11 Service de recherche, Bibliothèque du Parlement, Ottawa (13 février 1981) Conflict of Interest Regulations in the United States, United Kingdom and Canada, p. 16-17.

Le cas de la fonction publique britannique est assez semblable: on ne s'en est pas remis à un code global de conduite; on se fie plutôt à l'autodiscipline de la bureaucratie.

Alors que la pratique britannique repose sur une législation qui date du tournant du siècle, la conduite et la discipline des fonctionnaires en Grande-Bretagne sont exposées en grande mesure dans des règlements du Trésor. Ces règlements ont été conçus par la fonction publique elle-même et sont administrés par elle.[12]

Les principes généraux de conduite à l'intention des fonctionnaires britanniques découlent d'une étude réalisée en 1928. Cette étude préconise l'opinion que la fonction publique peut et doit s'autodiscipliner. Le paragraphe 55 du rapport déclare:

> La fonction publique, comme toute autre profession, a son code tacite d'éthique et de conduite dont la sanction la plus efficace est l'opinion publique de la fonction publique elle-même...[13]

De même, le paragraphe 59 déclare:

> Nous nous contentons d'exposer ces principes généraux, que nous ne tentons pas de développer pour en faire un code détaillé... Les règles pratiques qui guident la conduite sociale dépendent... tout autant de l'instinct et de la perception des individus que de formules coulées dans le béton...[14]

Selon G.P. Wilson, l'approche britannique s'est toujours fondée sur la discrétion et le jugement des fonctionnaires. Cette approche se fie dans une très large mesure aux fonctionnaires eux-mêmes de même qu'aux chefs d'organismes.[15]

Le rapport de 1928, énonce également comme suit la règle générale à l'égard des conflits d'intérêts:

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12 G.P. Wilson, "Conflicts of Interest in Public law in England," Acte du 6e symposium international sur le droit comparé, tenu à Ottawa, du 28 au 30 août 1968, Faculté de droit, Université d'Ottawa, les Éditions de l'Université d'Ottawa, Ottawa, 1969. p. 318-19. Cité ibid.; p. 27.

13 Cité dans Service de recherche, Bibliothèque du Parlement, op. cit., p. 28.

14. Ibid.

15 Wilson, op. cit. p. 320,. cité ibid., p. 29

> Le fonctionnaire ne doit pas subordonner son devoir à ses intérêts privés; mais il ne doit pas non plus se placer dans une situation où son devoir et ses intérêts viennent en conflit. Il ne doit pas se servir de ses affaires privées de façon à faire naître un soupçon d'abus de confiance...[16]

On trouve d'autres règles précises à l'égard des conflits d'intérêts à l'intention des fonctionnaires dans plusieurs lois, décrets, circulaires du Trésor, etc. En outre, bon nombre des restrictions imposées par ces règles sont souples en comparaison de celles des États-Unis. Par exemple, lorsqu'un fonctionnaire participe à l'adjudication d'un contrat gouvernemental, il doit révéler ce fait à son supérieur pour qu'une autre personne soit affectée à l'affaire. Cependant, il n'est pas absolument interdit à un fonctionnaire de signer un contrat avec son propre ministère. Il faudrait qu'un tel contrat soit approuvé par le chef de l'organisme, ce qui est sans doute improbable, mais néanmoins tout à fait possible et prévu par les règles.[17]

Il semble que les règles les plus complètes soient celles qui portent sur les emplois ultérieurs. Cependant, ici encore, la différence par rapport aux règles américaines, plus strictes, est énorme. La politique britannique sur les emplois ultérieurs tire son origine d'une note de service en date de 1937 sur l'acceptation des nominations commerciales par les fonctionnaires. Cette politique dispose que les hauts fonctionnaires doivent obtenir l'assentiment du gouvernement pour accepter des offres d'emploi auprès d'entreprises ou organismes:

a) qui ont des liens contractuels avec le gouvernement;

b) qui reçoivent des subsides ou l'équivalent du gouvernement;

c) dont le gouvernement est actionnaire;

d) qui reçoivent du gouvernement des prêts, des garanties ou d'autres formes d'assistance; ou

e) avec lesquels les services, ministères ou directions du gouvernement ont, de façon régulière, une relation particulière

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16 Cité par le Service de recherche, Bibliothèque du Parlement, op. cit.

17 Ibid. p. 29.

et auprès d'organismes semi-publics créés par le gouvernement ou le Parlement[18].

Cette politique n'a jamais été modifiée. En 1975, le Premier ministre Wilson, après avoir déclaré que les règles étaient satisfaisantes, y a apporté deux additions. Un comité consultatif permanent a été créé et on a exigé un délai de trois mois avant qu'un fonctionnaire puisse occuper un poste à l'extérieur.

Il vaut la peine de noter qu'une note adressée en 1968 par le Trésor à la Commission royale d'enquête sur la Fonction publique déclarait que bien que la permission d'accepter un emploi à l'extérieur ait rarement été refusée, on avait évité les plaintes du public quant à des nominations données.[19]

Malgré l'absence de plainte, il n'y a aucune interdiction absolue de "faire volte-face". L'approbation est d'ordinaire accordée. En outre, le délai de trois mois est extrêmement bref compte tenu du délai de deux ans qui s'applique aux États-Unis et au Canada. Finalement, ces restrictions ne s'appliquent qu'aux niveaux supérieurs (c'est-à-dire à partir du niveau de sous-secrétaire et les niveaux supérieurs).

Des directives assez fouillées sur plusieurs domaines de l'éthique professionnelle se retrouvent dans deux documents, soit le Civil Service Pay and Conditions of Service Code, qui contient essentiellement des règles et des directives à l'intention de tous les fonctionnaires et le Establishment Officers Guide, qui donne aux cadres des directives parallèles mais plus étoffées. Ces deux documents ont récemment remplacé un document ancien et bien connu intitulé Estacode.

e) Australie

En Australie, les députés sont régis par les règlements permanents des deux Chambres. Les députés à la Chambre des représentants ne peuvent voter sur des questions à l'égard desquelles ils détiennent un intérêt pécuniaire direct qui n'est pas détenu en commun avec les autres sujets de la Couronne. En réalité, cette restriction n'est pas très contraignante, puisque le député peut voter s'il détient des actions très répandues.

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18 "Acceptance of Outside Business Appointments by Crown Servants", Report of the Royal Commission on Standards of Conduct in Public Life, 1974-76, p. 193.

19 Service de recherche, Bibliothèque du Parlement, op. cit., p. 31.

> Pour empêcher un député de voter, il faut prouver que son intérêt pécuniaire est direct et personnel et n'est pas partagé avec beaucoup d'autres personnes. Les députés qui détenaient des blocs importants d'actions de chemins de fer n'ont pas été empêchés de voter, en 1947, contre un projet de loi sur la nationalisation des chemins de fer parce que l'intérêt financier en cause ne leur était pas particulier mais était partagé par un secteur important de la population.[20]

L'article 326 contient une clause plus contraignante:

> Aucun membre ne peut faire partie d'un comité s'il est intéressé personnellement à l'enquête dont est saisi le Comité.[21]

On retrouve une disposition semblable dans le règlement permanent du Sénat australien.[22]

Toutefois, même ces règlements ne se sont pas avérés très contraignants en pratique. En effet, seules les Chambres, et non les comités, ont le pouvoir d'empêcher un député de prendre part à une séance de comité. Dans un cas où un député semblait avoir un intérêt personnel (mais non financier) dans une affaire dont avait été saisi un comité, le président de la Chambre des représentants a refusé de donner une décision définitive, déclarant:

> À mon avis, la présidence ne peut déterminer si oui ou non un membre est personnellement intéressé à l'enquête d'un comité et il ne convient pas que le président soit appelé à trancher. Le député doit se guider d'après ses propres sentiments dans l'affaire et d'après le respect qu'il se doit à lui-même et qu'il doit à la Chambre. Compte tenu de l'existence et du libellé du règlement, il est probable que si une question de ce genre doit

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20 Service de recherche, Bibliothèque du Parlement, Conflict of Interest Rules for Parliamentarians in Australia, France and the Federal Republic of Germany", Ottawa, le 27 avril 1979, p. 3.

21 Article 326, Standing Orders of the House of representative, op. cit., p. 65.

22 Article 292, Standing Orders of the Senate, J.R. Odgers, Australian Senate Practice, Canberra, The Commonwealth Government Printer, 1977, p. 283.

être tranchée, c'est la Chambre elle-même qui le fera.[23]

Le gouvernement n'a pas insisté, mais il a exprimé une certaine désapprobation.[24] Malgré cela, le député a décidé de siéger au comité.[25] De même, en 1970, le Procureur général informait les sénateurs qu'ils devraient décider eux-mêmes s'ils étaient en situation de conflit d'intérêts et comment ils devraient agir. Depuis 1976, les ministres australiens doivent déclarer leurs intérêts pécuniaires au Bureau du Premier ministre. Cependant, ces renseignements sont confidentiels et il n'y a aucune divulgation publique[26].

En général, nous concluons que bien que l'Australie se soit dotée de règlements sur les conflits d'intérêts, ou bien les règlements ne sont pas très contraignants ou bien ils n'ont pas été appliqués avec une très grande rigueur.

Quant aux fonctionnaires australiens, le principal document est le "Code of Conduct" approuvé par le gouvernement. Ce code expose dix grands principes, notamment:

1) Le titulaire d'une charge publique doit s'acquitter de ses fonctions de façon impartiale, sans se laisser influencer par la crainte ou par des faveurs.

3) Le titulaire d'une charge publique doit éviter les situations où ses intérêts privés, pécuniaires ou autres, sont en conflit avec ses fonctions publiques ou peuvent raisonnablement être réputés l'être.

4) Lorsque le titulaire d'une charge publique possède, directement ou indirectement, un intérêt qui est en conflit avec ses fonctions ou qui peut raisonnablement être réputé l'être, ou peut être réputé influencer indûment sa conduite dans l'exercice de ses fonctions à l'égard d'une affaire dont il est saisi, il doit divulguer cet intérêt selon les procédures établies. Si les circonstances se modifient après la première divulgation, de sorte que des faits nouveaux ou additionnels entrent en jeu, le titulaire doit divulguer ces nouveaux renseignements.

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23 Debates in the House of Representatives of Australia, Canberra, 19 septembre 1963, p. 1178.

24 Ibid.

25 Service de recherche, Bibliothèque du Parlement, op. cit., p.6

26 Ibid. p. 9.

5) Lorsque les intérêts des membres de sa famille immédiate sont en cause, le titulaire d'une charge publique doit divulguer ces intérêts dans la mesure où il les connaît.

6) Lorsque le titulaire d'une charge publique possède un intérêt qui vient en conflit avec les fonctions de sa charge et si cet intérêt ne constitue pas une qualification prescrite pour cette charge, il doit aussitôt se dessaisir de cet intérêt, se faire libérer des fonctions en cause ou obtenir l'autorisation de son supérieur ou de ses collègues pour continuer à exercer ses fonctions.

Le titulaire d'une charge publique ne doit pas permettre à ses intérêts privés d'entraver l'exercice de ses fonctions officielles.[27]

Comme en Grande-Bretagne, l'accent est mis sur l'autodiscipline.

> Le code souligne l'importance de l'autoréglementation dans les questions de conflits d'intérêts. C'est à l'individu qu'il appartient de signaler tout conflit d'intérêts réel ou éventuel, pécuniaire ou autre; d'observer les principes exposés au code quant à ce qui peut constituer une inconduite et donner lieu à des mesures disciplinaires en vertu de la "Public Service Act".[28]

D'autres règlements obligent les fonctionnaires à obtenir l'approbation de la Commission de la Fonction publique pour tout emploi qu'ils peuvent vouloir accepter à l'extérieur[29], interdisent l'usage de renseignements officiels à des fins non officielles[30] et interdisent de solliciter ou d'accepter des cadeaux dans le cadre de leurs fonctions officielles.[31] En outre, on a adopté des règlements sur les emplois ultérieurs qui sont

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27 Public Service Board, Personnel Management Manual (vol. 30, "Guidelines on Official Conduct of Commonwealth Public servants", Canberra, 1982, p. 25-6.

28 Ibid. p. 26

29 Ibid., p. 25-26

30 Ibid., p. 29

31 Ibid.

très semblables à ceux du Royaume-Uni.32

f) Nouvelle-Zélande

La Nouvelle-Zélande semble avoir moins de règlements sur les conflits d'intérêts que n'importe quel autre gouvernement que nous avons examiné. Les documents dont nous disposons ne comportent par exemple aucune politique sur les activités ultérieures.

L'article 53 de la "State Services Act" contient à l'égard des emplois extérieurs une restriction similaire à celle de l'Australie. Cet article restreint également en quelque sorte les intérêts financiers qu'un fonctionnaire peut détenir.

> Rien n'empêche un employé d'être membre ou actionnaire seulement d'une compagnie, d'une société ou de personnes enregistrées en vertu d'une loi.
>
> Cependant, si les intérêts financiers d'un employé (y compris ses avoirs) dans une entreprise quelconque sont, de l'avis de la Commission, incompatibles avec l'exercice utile de ses fonctions officielles, l'employé peut être obligé de se dessaisir de ces intérêts.[33]

Il est intéressant de signaler qu'aucune obligation ne semble être faite aux fonctionnaires de divulguer leurs avoirs financiers.

Le seul autre règlement susceptible de nous intéresser (à part l'activité politique) porte sur l'acceptation de dons ou de cadeaux. Le Manuel de la fonction publique déclare ce qui suit:

> Un fonctionnaire ne doit pas, directement ou indirectement, solliciter ou accepter des dons ou des cadeaux d'un particulier intéressé, directement ou indirectement, à une affaire reliée aux fonctions de l'employé ou à la fonction publique...
>
> Un fonctionnaire ne doit pas exiger d'honoraires, de récompenses ou de rémunération de quelque sorte que ce soit, autres que son traitement et ses allocations, pour les services rendus ou à rendre, pendant les heures

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32 Ibid., pp. 33-4

33 State Services Commission, Public Service Manual (Section L) "Conduct of Employees," L 43. Voir aussi State Services Act 1962, art. 53(2)-(3).

normales de travail ou en un autre moment, à l'égard de la fonction publique.[34]

Il est manifeste que le gouvernement de la Nouvelle-Zélande n'a pas jugé nécessaire de préparer un ensemble élaboré ou approfondi de directives sur les conflits d'intérêts.

g) États-Unis d'Amérique

En 1978, le Congrès adoptait la "Ethics in Government Act", qui prévoyait la création du "Office of Government Ethics" (Bureau de l'éthique dans le secteur public), section spéciale du Bureau américain de la gestion du personnel, chargée de surveiller le programme des normes de conduite de l'exécutif fédéral. En particulier, le Bureau est chargé de prévenir les conflits éventuels d'intérêts, c'est-à-dire les situations où les fonctionnaires pourraient être déchirés entre leur devoir de servir le public de façon impartiale et la possibilité d'un avantage personnel.

C'est en 1965 que l'exécutif fédéral a élaboré ses premières lignes directrices officielles sur les conflits d'intérêts et les normes d'éthique. Ces directives, exposées dans un décret (Executive Order 11222), servent de fondement aux règlements qui figurent à la Partie 735 du titre 5 du "Code of Federal Regulations". En général, elles interdisent aux fonctionnaires de solliciter ou d'accepter des cadeaux, des prêts ou des faveurs particulières de toute partie qui puisse être économiquement, juridiquement ou autrement affectée de façon substantielle par l'entremise du fonctionnaire ou par ses actes officiels.

La loi interdit en outre aux employés de faire quoi que ce soit qui puisse aboutir ou sembler aboutir:

- à se servir d'une charge publique pour un avantage personnel;
- à donner un traitement de faveur à un organisme ou à un groupe;
- à nuire à l'efficacité du gouvernement;
- à prendre une décision gouvernementale sans passer par la filière officielle;
- à perdre l'impartialité d'action; ou

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34 State Services Commission, Public Service Manual (Section L) "Conduct of Employees," L 43. Voir aussi State Services Act 1962, art. 53 (2)-(3), L. 60-61.

- à miner d'une façon ou d'une autre la confiance du public en l'intégrité du gouvernement.

Les avocats et les analystes du Bureau non seulement font respecter les politiques de l'exécutif à l'égard des conflits d'intérêts, mais contrôlent les exigences gouvernementales en matière de divulgations financières, les règlements sur les emplois ultérieurs et les programmes de sensibilisation. En outre, le Bureau émet des opinions et des conseils sur certains problèmes d'éthique.

Au chapitre de la divulgation financière en vertu de la "Ethics in Government Act", le Bureau est chargé de surveiller deux sortes de déclarations financières exigées de l'exécutif fédéral. La première vise les fonctionnaires du palier GS-15 et des paliers inférieurs qui participent à des contrats, des achats, des subventions ou des subsides ou dont les décisions ont des répercussions économiques sur toute entreprise non fédérale et qui doivent déposer un rapport confidentiel sur leur situation financière. À moins que le directeur d'un organisme ne démontre une bonne raison d'agir autrement, aucun renseignement contenu dans ces déclarations ne peut être publié. La seconde catégorie comprend les échelons supérieurs de l'exécutif, y compris le Président et le Vice-Président des États-Unis. Ceux-ci doivent déposer un rapport public complet, le 15 mai, portant sur le revenu général, les actifs et les passifs au cours de l'année civile précédente. Ces déclarations sont rendues publiques dans les 15 jours du dépôt, soit par l'organisme en cause ou, dans certains cas, par le Bureau de l'éthique dans le secteur public.

Au chapitre des charges ultérieures, en fonction des dispositions de la loi, le Bureau a publié un ensemble complet de règles régissant les activités des anciens employés fédéraux. Ces règles visent à empêcher les conflits d'intérêts chez les personnes qui travaillent dans le secteur privé après avoir fait partie du secteur public.

Parmi les restrictions à cet égard, on note:

- L'ancien employé, sa vie durant, ne peut représenter qui que ce soit à l'égard d'une question dont il s'est occupé personnellement et substantiellement alors qu'il était au gouvernement.

- L'ancien employé ne peut, pendant deux ans, représenter qui que ce soit à l'égard d'une affaire dont il avait la "responsabilité officielle" alors qu'il était au gouvernement. La responsabilité officielle est définie de façon très précise dans la "Ethics in Government Act".

- Certaines interdictions s'appliquent aux anciens employés du niveau exécutif, aux anciens militaires de rang O-9 ou de rang supérieur ainsi qu'aux titulaires de rang GS-17 ou de rang supérieur dont l'ancien poste comportait des pouvoirs décisionnels importants ou des responsabilités de surveillance, selon la détermination faite par le Bureau de l'éthique. Il est notamment interdit à ces anciens titulaires: 1) pendant deux ans, d'aider à représenter en personne qui que ce soit dans une procédure portant sur une question dont l'ancien titulaire s'était occupé personnellement et substantiellement alors qu'il était au gouvernement et 2) pendant un an, de tenter oralement ou par écrit d'influencer son ancien organisme au nom de qui que ce soit sur quelque affaire que ce soit. (Cependant, le Bureau peut juger que certains bureaux ou divisions d'un organisme ont des fonctions distinctes de celles du reste de l'organisme. Dans de tels cas, il peut être interdit aux anciens employés de communiquer avec le service pour lequel ils ont travaillé, mais ils sont libres de communiquer avec d'autres services du même organisme.)

Le département de la Justice, le Bureau de l'éthique et l'organisme en cause sont chargés de l'application de ces règles.

Le programme américain met fortement l'accent sur la sensibilisation. Afin de tenir les fonctionnaires fédéraux au courant du programme d'éthique du gouvernement, chaque organisme désigne un fonctionnaire responsable de l'éthique qui distribue les nouveaux renseignements, répond aux questions concernant les conflits d'intérêts et sert d'agent de liaison avec le Bureau de l'éthique. En outre, le personnel du Bureau visite les organismes pour leur fournir de l'aide et s'assurer que les lois sont respectées.

Bien que le Bureau de l'éthique donne des consultations officielles à l'égard de questions particulières, il lui arrive plus souvent de donner des conseils officieux. Les fonctionnaires du gouvernement ou les particuliers qui ont une question d'éthique à poser à l'égard d'un organisme donné doivent d'abord communiquer avec le fonctionnaire désigné de l'organisme avant de s'adresser au Bureau de l'éthique.

En conclusion, nous signalons que la "Ethics in Government Act", adopté par le Congrès en 1978, devait devenir caduque au bout de cinq ans; c'est pourquoi, à la fin de 1983, la loi a dû être autorisée de nouveau par le Congrès, sans quoi elle aurait été abrogée et le Bureau de l'éthique aurait cessé d'exister. Cela n'aurait pas pu arriver plus à-propos pour les fins de notre étude. Deux comités du Sénat et un comité de la

Chambre des représentants ont été saisis de cette loi et ont discuté longuement les points forts et les points faibles révélés par cinq années d'expérience. Cet examen en profondeur a abouti à plusieurs modifications à la loi visant à combler des lacunes qui n'avaient pas été remarquées lors de l'adoption du système cinq ans auparavant. L'étude des comptes rendus de ces débats nous a été des plus profitable.

h) Façons d'aborder les conflits d'intérêts et les normes de conduite dans le secteur privé.

1) Professions

Nous avons examiné la façon dont sont traités les conflits d'intérêts par le code de conduite ou d'éthique de plusieurs professions, soit le droit, la médecine, la comptabilité et le génie. Ces quatre professions sont parmi les plus visibles et les plus anciennes et elles ont une longue expérience des questions de conflits d'intérêts. Il ne s'agit nullement d'un inventaire complet, mais d'une présentation générale des diverses façons dont les professions ont abordé ce dossier.

Génie. Les ingénieurs professionnels sont régis par des associations professionnelles. Nous avons examiné les codes d'éthique de quatre de ces associations. Bien qu'ils ne soient pas identiques, ils traduisent une préoccupation commune à l'égard des conflits d'intérêts auxquels un ingénieur pourrait devoir faire face.

Par exemple, l'Ordre des ingénieurs du Québec déclare qu'un ingénieur doit préserver en tout temps son indépendance professionnelle et éviter toute situation qui pourrait le mettre en conflit d'intérêts. De même les codes des ingénieurs professionnels de l'Alberta exigent que les membres évitent les conflits d'intérêts. Les ingénieurs doivent également divulguer aux clients ou aux employeurs tout conflit d'intérêts qui pourrait se présenter. Dans ces provinces, un ingénieur peut maintenir sa relation avec un client malgré un conflit d'intérêts, à la condition de l'avoir déclaré au client et que celui-ci l'ait autorisé à poursuivre.

Au plan des détails, les codes mentionnent certains types de conflits d'intérêts que pourrait rencontrer un ingénieur. Le code d'éthique de l'Association des ingénieurs professionnels de l'Ontario est peut-être le plus complet à cet égard. Il déclare par exemple que les ingénieurs ne devraient pas être intéressés aux fournitures ou à l'équipement utilisés par l'employeur et qu'ils ne devraient pas non plus servir d'ingénieurs-conseils pour un projet dont ils sont également l'entrepreneur, à moins de divulgation.

Alors que les associations provinciales régissent la conduite des ingénieurs dans chaque province, l'Association des ingénieurs-conseils du Canada dispose de certains pouvoirs sur les firmes qui en sont membres. C'est pourquoi l'Association a préparé un code, le "Code of Consulting Engineering Practice". Ses pouvoirs disciplinaires sont assez limités, car elle ne peut que réprimander ou radier une firme membre.

Le code de l'Association contient deux règles qui portent expressément sur les conflits d'intérêts. La première stipule que les membres doivent s'acquitter de leurs fonctions professionnelles avec intégrité et une complète loyauté envers les clauses de leur affectation. Cela pourrait s'interpréter comme enjoignant aux membres d'éviter les conflits d'intérêts. La seconde règle demande aux membres de divulguer tout conflit d'intérêts à leurs clients.

Comptabilité. Les codes de conduite des comptables agréés sont établis par les chapitres provinciaux de l'Institut canadien des comptables agréés. Les règles de conduite professionnelle du chapitre de l'Ontario précisent que la profession se caractérise par un point de vue essentiellement objectif. En outre, les praticiens acceptent qu'ils doivent subordonner leurs intérêts personnels au bien public.

Il y a ici deux notions fondamentales susceptibles d'une large application. En premier lieu la notion d'objectivité et d'absence d'esprit partisan dans l'exercice de son travail et en second lieu, le sentiment d'une responsabilité envers le public. Non seulement ces deux idées sont-elles pertinentes pour toutes les professions, mais elles s'appliqueraient aux fonctionnaires.

Les règles de conduite traitent ensuite d'une façon plus précise des conflits d'intérêts. Les exigences de la société envers ses institutions obligent les comptables agréés à être objectifs et à se conduire avec intégrité dans la prestation de leurs services professionnels. Il est donc essentiel qu'un membre de la profession ne subordonne pas son jugement professionnel à la volonté d'autrui et qu'il exprime ses conclusions avec honnêteté et impartialité, puisque le public doit être assuré que le comptable agréé est libre de tout conflit d'intérêts.

Puisque le public doit être protégé contre tout conflit d'intérêt impliquant des comptables, la profession doit appliquer le critère de l'homme raisonnable pour juger si l'indépendance ou l'objectivité d'un praticien ont été compromises. Selon les règles:

> Tout membre engagé pour exprimer une opinion sur des états financiers doit se libérer de toute influence, de tout intérêt ou de toute relation à l'égard des affaires de ses clients qui nuit à son jugement professionnel ou

à son objectivité ou qui, de l'avis d'un observateur raisonnable, a cet effet.

Les firmes comptables peuvent également avoir leur propre code qui traite de la conduite professionnelle et des conflits d'intérêts. Par exemple, une firme importante a préparé, à l'intention de son personnel professionnel, un guide où il est indiqué que les associés et le personnel doivent respecter les règles de conduite professionnelle établies par les instituts ou les ordres provinciaux de comptables agréés et de conseillers en gestion.

Ce guide expose ensuite des règles particulières à certaines situations. Par exemple, les associés ne doivent pas accepter de cadeaux d'un client. De même, ils ne peuvent détenir des actions ou des titres des sociétés clientes. Signalons que cette firme exige que les membres du personnel de vérification avertissent leur supérieur ou un associé s'ils sont affectés à une vérification auprès d'une société où ils ont déjà travaillé comme employés, où un de leurs parents est employé, ou encore lorsqu'un de leurs parents est employé par un concurrent du client. Cette exigence s'apparente aux lignes directrices gouvernementales sur les emplois ultérieurs.

Médecine. Au Canada, les médecins détiennent une licence provinciale. Cependant, leur seul code de conduite est le Code d'éthique promulgué par l'Association médicale du Canada (AMC).

Le code d'éthique de l'AMC ne traite pas expressément de la question des conflits d'intérêts. Cependant, plusieurs des articles du code traitent de situations concrètes qui pourraient être considérées comme une source éventuelle de conflit d'intérêts. Par exemple, le code déclare que le médecin, avant d'examiner un malade au nom d'un tiers, devrait communiquer au malade sa responsabilité légale envers ce tiers.

À l'égard des dispositions financières, les médecins doivent éviter tout motif de bénéfice personnel lorsqu'ils commandent des médicaments, des examens et des analyses, etc. Ainsi, il serait manifestement interdit à un médecin d'être propriétaire d'une clinique radiologique à laquelle il pourrait envoyer ses malades. En même temps, les médecins doivent refuser tout paiement pour leurs services provenant de personnes autres que le malade. Le code d'éthique déclare en outre que le médecin, lorsqu'il témoigne devant un tribunal, doit reconnaître qu'il doit aider la cour à en arriver à une décision juste.

Certains pourraient mettre en doute l'efficacité de ce code. Il peut y avoir des cas où certains médecins prescrivent des traitements inutiles ou reçoivent de temps à autre des échantillons de médicaments de sociétés pharmaceutiques. Quant aux professionnels de la médecine qui témoignent en cour, la

préoccupation de justice ne semble pas aussi claire en pratique que dans le code. Par exemple, dans les affaires criminelles, les psychiatres s'identifient souvent soit à la poursuite soit à la défense. Il semble exister certaines pratiques indésirables que le code d'éthique n'a pas complètement éliminé.

Droit. Les avocats canadiens sont régis par les barreaux des provinces, qui ont chacun leur code d'éthique professionnelle. En outre, l'Association canadienne du barreau (ACB) a publié son propre code.

Le code d'éthique professionnelle de l'ACB traite peut-être plus en profondeur l'éthique professionnelle et le conflit d'intérêts que celui de toute autre association professionnelle. La règle générale est que les avocats :

> ne doivent ni conseiller ni représenter les deux côtés d'un litige et, sauf s'ils ont convenablement divulgué la chose et obtenu un consentement du client... ne devraient pas agir ou continuer d'agir dans une affaire où il existe ou risque d'exister un conflit d'intérêts."

L'intérêt en conflit est celui qui risque d'entraver le jugement de l'avocat ou sa loyauté envers un client ou celui que l'avocat pourrait être porté à préférer aux intérêts du client.

Le code ajoute des commentaires illustrant les diverses situations qui pourraient se produire. Les conflits d'intérêts ne se limitent pas aux affaires financières des avocats. Le code traite également de l'obligation de divulguer les conflits d'intérêts au client. Dans certains cas, le client peut, à juste titre, conserver les services d'un avocat en dépit d'un conflit d'intérêts. Dans d'autres cas, l'avocat peut devoir se récuser complètement. Le code laisse une place considérable au jugement professionnel, d'après les circonstances du cas.

Diverses études d'avocats ont publié leurs propres politiques pour compléter le code de leur barreau. Par exemple, une importante firme canadienne a préparé des directives précises portant, notamment, sur les emprunts au client, le commerce des titres publics des clients et des placements dans l'entreprise des clients autrement que par des titres cotés en bourse.

Les avocats semblent avoir l'ensemble le plus complet de directives en matière d'éthique professionnelle, fondées sur de nobles principes d'honnêteté et d'intégrité. Cependant, cela n'a pas empêché la méfiance ou les soupçons du public à leur égard. Les profanes croient, à des degrés divers, que les avocats ne respectent pas toujours leurs principes et ne sont pas toujours dignes de confiance.

Il y a eu un exemple saisissant pendant l'affaire "Watergate". On a souligné le fait qu'un grand nombre des conspirateurs étaient des avocats. Lorsque le Procureur général John Mitchell a été inculpé et trouvé coupable d'actes criminels, la réputation de la profession a été durement touchée. Même si bon nombre des avocats coupables ont été radiés du barreau, il demeure que les nobles codes d'éthique et de conduite n'ont pas empêché que des infractions soient commises. On pourrait faire valoir que la moralité et l'intégrité des avocats n'est pas supérieure à celle des autres membres de la société et que leur comportement professionnel peut être influencé par leurs faiblesses personnelles et l'appât du gain.

Une telle attitude peut tenir en partie à la nature des grandes professions traditionnelles, qui s'auto-réglementent. Les avocats, les médecins, les comptables, les ingénieurs, etc. oeuvrent tous dans un domaine complexe de spécialisation qui est quelque peu mystérieux pour le profane. Le fait que ces professions s'auto-réglementent contribue à donner l'impression qu'elles ont un monopole de connaissances particulières. On peut aussi faire valoir un argument contraire. Cependant, les codes professionnels et les recours ne suffisent pas à garantir la confiance et le bien-être du public.

Il pourrait y avoir à cela deux raisons. En premier lieu, les codes d'éthique professionnelle pourraient être incomplets à l'égard des conflits d'intérêts. Cependant, notre examen des divers codes professionnels montre une préoccupation générale, uniforme et raisonnablement profonde d'éviter cela. En général, les codes d'éthique professionnelle se préoccupent d'une façon appropriée et satisfaisante de ce problème. La seconde raison possible tient à la mesure dans laquelle les associations professionnelles sont prêtes à appliquer les codes à leurs membres. Étant donné que les associations professionnelles se réglementent elles-mêmes et que les codes demandent beaucoup de respect et même de confraternité entre les membres, il n'est pas étonnant que l'application des codes de conduite ne soit pas toujours très rigoureuse. Le principal objectif des professionnels est d'exercer une profession, non pas d'administrer d'autres personnes qui font la même chose. Enfin, la notion même de jugement professionnel implique une confiance en l'honneur et en l'intégrité des praticiens.

Nous concluons donc que les cas où le public n'a pas été convenablement protégé contre les abus de privilège découlent probablement des caractéristiques des professions auto-réglementées - leur homogénéité, leur tendance à faire bande à part et le contrôle qu'elles exercent sur des connaissances techniques cruciales. Étant donné ces caractéristiques, on peut aisément comprendre qu'il leur soit difficile d'appliquer les codes de conduite dans tous les cas avec toute la vigueur nécessaire. Cela étant dit, il faut ajouter que le dossier de la grande majorité des professionnels est sans tache.

Les codes professionnels semblent assez complets au chapitre des conflits d'intérêts. Les règles sont souvent exposées de façon assez générale mais, à notre avis, c'est ainsi qu'il faut faire. Les difficultés qui se sont présentées à l'égard de leur application semblent découler d'un manque de motivation ou sont attribuables aux rouages administratifs plutôt qu'à des lacunes intrinsèques.

Certains des facteurs qui empêchent les professionnels d'imposer des mesures disciplinaires à l'un des leurs n'existent pas dans la fonction publique. Le gouvernement n'est pas un ensemble homogène de praticiens indépendants. On n'y trouve pas la même attitude confraternelle que dans les grandes professions. En outre, les fonctionnaires sont tous des employés de la Couronne. C'est là une situation très distincte de celle des associés d'une entreprise professionnelle. Ceux-ci sont à leur propre compte, ce qui ajoute à leur indépendance.

Néanmoins, la fonction publique devra s'assurer que tout code qu'elle adopte puisse être appliqué. Si on s'en remet aux gestionnaires (sous la responsabilité des sous-ministres et des chefs des organismes) pour appliquer un tel code, il pourrait y avoir des problèmes d'uniformité de traitement aussi bien que de motivation. En termes simples, certains gestionnaires pourraient n'attacher qu'une importance toute relative à la question des conflits d'intérêts.

2) Sociétés commerciales

On croit en général que le secteur privé se préoccupe beaucoup moins des conflits d'intérêts et, d'une façon plus générale, de la moralité commerciale. Cette perception peut dépendre dans une certaine mesure du fait que le secteur privé est effectivement privé et ne comporte pas cet élément de confiance publique qu'entraîne le travail gouvernemental. Il n'est donc pas étonnant que certaines des sociétés avec lesquelles nous avons communiqué dans le cadre de notre examen des pratiques du secteur privé ne disposaient pas de code d'éthique ni de politique à l'égard des conflits d'intérêts. Pourtant, nous avons reçu des exemplaires de bon nombre de codes d'éthique commerciale. Ceux-ci proviennent en général de sociétés importantes qui ont la main-d'oeuvre et l'expertise nécessaires pour les élaborer.

Contrairement à la notion que tout est permis dans le secteur privé, les grandes sociétés, dont les actions sont traitées en bourse et qui comptent un grand nombre d'employés, ont besoin de directives sur l'éthique professionnelle. Les employés de ces sociétés sont considérés avoir des responsabilités et des devoirs de confiance envers les actionnaires et l'ensemble de l'organisme. Ils doivent allégeance à leur société d'abord et doivent donc être libres d'intérêts ou de rapports qui puissent

nuire aux intérêts de cette société. Non seulement les employés doivent-ils éviter les conflits réels, mais aussi les apparences de conflits qui pourraient ternir leur propre image ou celle de l'entreprise.

La plupart des codes de grandes sociétés que nous avons étudiés traitent du même genre de questions. Par exemple, on se préoccupe généralement d'assurer que les employés ne soient pas intéressés à la fourniture de biens ou de services à l'entreprise. De même, les sociétés privées ne veulent manifestement pas que leurs employés détiennent un intérêt dans l'entreprise d'un concurrent. Une autre préoccupation fréquente concerne les paiements aux fonctionnaires gouvernementaux ou aux clients. En général, on ne peut donner, payer, promettre ou offrir, directement ou indirectement, quoi que ce soit de valeur (y compris les paiements au comptant, les cadeaux, les faveurs ou les réceptions) à un fonctionnaire gouvernemental, à un client ou à un client éventuel aux fins d'obtenir un traitement de faveur.

Au moins deux sociétés ont des codes qui traitent des contributions politiques. Les lois américaines sur les campagnes électorales interdisent les contributions politiques de la part des sociétés. Les employés qui travaillent dans des juridictions, aux États-Unis ou ailleurs, où les contributions politiques des sociétés sont illégales peuvent faire des contributions politiques personnelles aux candidats et aux organismes de leur choix. Naturellement, aucun employé ne devrait faire une contribution personnelle en vue d'aider l'entreprise à obtenir ou à conserver des affaires.

Les codes des sociétés ne traitent pas généralement en détail des conflits d'intérêts, car on ne saurait cerner tous les cas précis qui pourraient se produire. Cependant, ils énoncent les principes de base d'une façon claire et directe; ces principes sont conformes à ceux que le gouvernement a adoptés et que nous considérons appropriés.

3) Codes d'éthique commerciale

Lors de nos rencontres, nous avons entendu des hauts fonctionnaires bien informés exprimer, avec beaucoup de conviction, l'avis que les normes de conduite dans le secteur public devaient être plus élevées que dans le secteur privé - ce qui sous-entend que tout est permis dans le monde des affaires.

On ne peut se fier à de telles généralisations, parce qu'elles ne tiennent pas compte de la grande variété des situations réelles; nous avons pu constater le cas de sociétés du secteur privé qui avaient des codes d'éthique très approfondis et qui s'y conformaient rigoureusement. Les douzaines de sociétés qui

nous ont fourni des exemplaires de leur code de conduite et de leur politique sur les conflits d'intérêts constituent des exemples remarquables de ce qui est possible.

Une société importante du domaine des ressources naturelles souligne que pour elle la question des conflits d'intérêts, de même que la rigoureuse observance des lois sur les coalitions, font partie de l'ensemble de l'éthique professionnelle dans la société. Cette société est fière de sa tradition de respect des principes et tâche de maintenir les normes les plus élevées de la pratique commerciale. La réputation de l'entreprise repose sur le comportement de chaque personne qui y travaille; en conséquence, on attache la plus grande importance à la communication correcte et régulière de ces objectifs aux employés. Le programme est revu chaque année par un comité interne chargé d'évaluer l'efficacité de cette communication.

Cette société, qui est typique de bon nombre de sociétés canadiennes, communique ses opinions sur l'éthique professionnelle à tous les employés au moyen d'une publication intitulée Corporate Ethics : A Statement of Role and Principles. Cette publication est distribuée aux employés au moment de l'embauchage et à divers moments pendant leur carrière. Elle s'accompagne d'une lettre du président directeur-général pour bien faire comprendre toute l'importance que la société accorde aux questions d'éthique professionnelle.

Il existe évidemment un groupe particulier d'employés qui, par leur rôle de cadre ou parce qu'ils sont exposés à des renseignements confidentiels dans l'exercice de leurs fonctions, sont davantage exposés à des situations qui peuvent entraîner des conflits d'intérêts. Dans le cadre des activités de vérification et d'examen de cette société, on demande à ces employés de signer chaque année une déclaration attestant qu'ils observent les politiques de la compagnie en matière d'éthique professionnelle, de conflits d'intérêts et dans les domaines connexes.

La force de cette démarche semble tenir à ce que, en premier lieu, la société tente de rendre son code aussi explicite que possible pour les employés et, en second lieu, que la société prévoit un mécanisme de counselling dans les domaines qui peuvent sembler ambigus ou peu clairs aux employés. Il ne fait aucun doute que c'est à l'employé que revient la responsabilité de la divulgation.

Après avoir étudié les programmes et les méthodes de diverses sociétés comme celle-ci, nous concluons que dans bon nombre de cas, les sociétés d'État et les ministères du gouvernement fédéral auraient beaucoup à apprendre du secteur privé, notamment la reformulation des règles pour les rendre claires, l'usage de codes complémentaires, le fait d'assurer une orientation explicite dans des cas particuliers, d'inciter

davantage les employés à demander des conseils à l'égard des problèmes qui se posent ainsi que de renforcer le rôle de sensibilisation à l'égard des règles portant sur les conflits d'intérêts.

CHAPITRE 11

EXAMEN DE PROBLÈMES PARTICULIERS

Avant de présenter les principales recommandations, il est tout à fait indiqué d'examiner les répercussions qu'ont les règles régissant les conflits d'intérêts sur des groupes particuliers de titulaires de charges publiques et sur un certain nombre de questions bien précises, notamment a) la protection des renseignements personnels et la confidentialité, b) les organismes dont le mandat est de courte durée, c) l'investissement d'argent et la propriété de biens par des titulaires de charges publiques, d) les titulaires de charges publiques ayant un autre emploi à l'extérieur du gouvernement, e) la nature du "lobbying" dans le système politique canadien, f) l'application des règles aux conjoints et aux membres de la famille, g) les renseignements confidentiels et l'obligation de témoigner, h) les sanctions et pénalités, et i) les relations entre les secteurs public et privé.

a) Protection des renseignements personnels et confidentialité

L'adoption de la Loi sur la protection des renseignements personnels et de la Loi sur l'accès à l'information n'a pas eu de répercussion sur les procédures de traitement des dossiers et des documents concernant l'administration des lignes directrices relatives aux conflits d'intérêts.

Les dossiers personnels et confidentiels concernant les personnes nommées par le gouverneur en conseil, les ministres de la Couronne et leur personnel soustrait ne peuvent toujours pas être consultés par le public, sous aucun prétexte, et sont traités comme des documents portant une cote de sécurité. Les seuls documents auxquels le grand public peut avoir accès sur demande sont ceux placés dans le Registre public au Bureau du sous-registraire général adjoint.

b) Organismes dont le mandat est de courte durée

Les organismes dont le mandat est de courte durée comme les commissions royales et les groupes d'étude sont créés par le gouvernement pour une variété de raisons. Leur utilité réside dans le fait qu'ils permettent d'examiner rapidement et à peu de frais des sujets particuliers. Ils sont institués par divers moyens, notamment les lois en place, la prérogative dont jouit le Premier ministre et la Loi sur les enquêtes. Le type d'organisme créé et sa raison d'être détermineront dans une large mesure ses besoins en personnel. Est-il à-propos dès lors de soumettre le personnel de ces organismes à un régime de réglementation en matière de conflits d'intérêts?

Dans bien des cas, les personnes nommées à un organisme dont le mandat est de courte durée viennent de l'extérieur de la fonction publique. À la fin de leur mandat, elles retournent habituellement à la vie privée. L'imposition de lignes directrices sur la période après-mandat comportant une phase de transition compliquerait le recrutement par le gouvernement de personnes ayant les compétences nécessaires. De plus, il ne serait pas raisonnable dans tous les cas de leur demander d'abandonner leurs intérêts et de renoncer à leurs postes d'administration pour une période très courte.

La nature du travail de l'organisme doit aussi être examinée attentivement. Si des personnes de l'industrie des pêches sont nommées pour mener une enquête sur certaines pratiques en matière de pêche, il pourrait exister une possibilité de conflits d'intérêts. On pourrait très bien leur demander de se départir temporairement de leurs intérêts dans cette industrie au moyen de la fiducie. Par contre, si un groupe se voit chargé d'étudier les conséquences du déménagement d'une ambassade d'une ville à l'autre à l'étranger, la possibilité de conflit est faible et probablement inexistante.

En résumé, on ne peut établir de règles d'application générale. Le Conseiller en éthique devrait être consulté dans tous les cas pour s'assurer de l'importance d'un conflit d'intérêts.

c) Investissements et propriété de biens par les titulaires de charges publiques

1. Les investissements

En vertu des lignes directrices actuelles, les ministres et les personnes nommées par le gouverneur en conseil doivent placer en fiducie ou vendre toutes les actions qu'ils détiennent dans des sociétés cotées en bourse ainsi que tous les autres biens réglementés. Les fonctionnaires sont aussi tenus de faire de même lorsque leurs avoirs entrent ou risquent d'entrer en conflit avec leurs fonctions officielles.

Selon les lignes de conduite à l'intention des personnes nommées par le gouverneur en conseil, la plupart des fonds mutuels sont considérés comme des biens exemptés qui ne sont pas soumis aux exigences de déssaisissement s'ils sont détenus aux fins d'un revenu de retraite. D'autre part, les lignes directrices à l'intention des ministres considèrent tous les fonds mutuels comme des biens exemptés. Ils sont assimilés à une fiducie sans droit de regard puisque l'une de leurs caractéristiques essentielles est qu'ils sont gérés par une autre personne, sans consultation avec le propriétaire.

La Tradex Investment Fund Limited est une de ces sociétés de fonds mutuels qui investit dans des titres de

compagnies et qui vend continuellement ses actions. La gestion de l'actif de la société est entre les mains d'une firme d'experts-conseils en investissement. Seuls les titulaires de charges publiques ou leur famille peuvent détenir des actions de Tradex.

Au cours des dernières années, la majorité des administrateurs engagés par cette société provenait du ministère de l'Industrie et du Commerce et de Statistique Canada. Certains agents de ces ministères ont accès à des renseignements confidentiels concernant l'actif et la santé financière de sociétés. Les administrateurs et les gestionnaires ont pris un certain nombre de mesures en vue d'éviter que l'on accuse les hauts fonctionnaires d'utiliser des renseignements d'initiés pour guider les décisions de Tradex en matière d'investissements. La déclaration suivante figure dans le prospectus de la société Tradex depuis cinq ans:

> En vertu d'un accord prenant effet le 5 juin 1969, la Société a retenu les services de la firme Sceptre Investment Counsel Limited (nommé ci-après la Investment Counsel) qui agira en tant qu'expert-conseil en investissement afin de gérer son portefeuille d'investissement. Celle-ci choisit, achète et vend les valeurs du portefeuille de la Société et en assure une surveillance continue. L'accord prévoit, conformément à la restriction stipulée dans les lettres patentes de la Société que la Investment Counsel ne cherchera pas à obtenir, recevoir ou utiliser des renseignements ou conseils qui proviendraient directement ou indirectement d'un administrateur ou d'un actionnaire de la Société. Le but de cette disposition est d'empêcher qu'un administrateur ou un actionnaire ait une influence sur les décisions concernant l'achat ou la vente de valeurs de la Société. Le conseil d'administration, par son comité de liaison composé d'experts-conseils en investissement, évalue régulièrement le travail de la Investment Counsel mais comme il est indiqué dans les lettres patentes, il ne lui fait aucune recommandation concernant la vente ou l'achat de n'importe quel titre en particulier. (Le soulignement est ajouté)

Nous avons appris que la société Tradex est considérée de la même façon que les autres sociétés de fonds mutuels en ce qui a trait à la question des conflits d'intérêts.

Le Bureau du sous-registraire général adjoint, dans l'exécution de ses fonctions, est amené à prendre connaissance d'une vaste gamme de plans d'investissement. Il a préparé un certain nombre de notes internes afin de familiariser son personnel avec les véhicules d'investissements multiples et complexes dont les Canadiens peuvent maintenant se prévaloir et leur permettre de déterminer s'ils sont compatibles avec les lignes de conduite en matière de conflits d'intérêts.

2. La possession de biens immobiliers

En général, les titulaires de charges publiques sont soumis aux mêmes règles que d'autres travailleurs en ce qui concerne la possession de biens immobiliers dans les cas où des conflits d'intérêt pourraient surgir. Cependant, des règles et problèmes particuliers les visent spécifiquement.

Certaines personnes nommées par le gouverneur en conseil sont tenues d'être des fermiers afin de satisfaire aux exigences requises pour leur nomination. Elles font alors une déclaration publique concernant leur exploitation et un échange de lettres a lieu à ce sujet entre elles, le ministre responsable et le sous-registraire général adjoint. La loi créant l'organisme dans ce cas a plus de poids que les lignes de conduite en matière de conflits d'intérêts.

Si une ferme est achetée par un titulaire de charge publique qui sait que le gouvernement a l'intention d'acheter le terrain à un moment donné, il y a de fortes possibilités qu'il soit présumé avoir utilisé des renseignements officiels afin de servir ses propres intérêts.

Il y a un certain nombre de cas particuliers où la propriété de biens immobiliers doit être minutieusement examinée. Toute opération commerciale entre le gouvernement et le titulaire d'une charge publique concernant l'achat et la vente de biens immobiliers soulève diverses questions, que O.P. Dwivedi présente de la façon suivante:

> Les fonctionnaires, tout comme d'autres citoyens, peuvent acquérir des biens immobiliers ou s'en départir par location, hypothèque, achat, vente, don ou d'autres moyens, et il n'est pas nécessaire d'obtenir une autorisation du gouvernement pour ce faire. Mais on ne peut acheter d'un fonctionnaire ou lui vendre des biens appartenant au gouvernement sans obtenir l'approbation officielle du Conseil du Trésor. De plus, par tradition, les fonctionnaires n'ont pas le droit de participer à des ventes aux enchères de biens du gouvernement s'ils travaillent pour le ministère qui organise la vente aux enchères. À part cette restriction non officielle, il n'existe aucune autre interdiction concernant l'achat ou la vente de biens par des fonctionnaires. Cette lacune peut être une cause de corruption chez certains hauts fonctionnaires. Il y a eu quelques rares cas où certains d'entre eux ont réussi à acheter un terrain coûteux à un prix inférieur à la valeur économique réelle du terrain parce qu'ils ont contraint d'une certaine façon l'autre partie à vendre en utilisant leur position officielle. Pour éviter que

> les fonctionnaires soient ainsi tentés, il est nécessaire de leur imposer des restrictions sur l'achat et la vente de propriétés. Ils devraient être obligés d'obtenir la permission de leur sous-ministre avant d'acheter ou de vendre tout terrain.[1]

Des problèmes surviennent aussi lorsqu'une personne agit à titre de fiduciaire pour une succession dont les biens doivent être expropriés par le bureau pour lequel elle travaille.

Enfin, l'acquisition d'éléments d'actifs appartenant au patrimoine public peut être la cause de conflits d'intérêts pour les titulaires de charges publiques possédant des renseignements confidentiels et qui sont en mesure d'acquérir ou de louer des biens de surplus du patrimoine public par des moyens dont le public en général ne dispose pas. Voici deux exemples de ce type de problème:

1. l'acquisition de biens excédentaires de la Couronne, de biens privés confisqués ou non réclamés, de sous-produits commercialisables découlant de programmes gouvernementaux avant qu'ils aient été mis en vente publique ou pendant que le bureau du titulaire est responsable de leur vente;

2. la signature d'un bail de location pour une propriété de la Couronne dont l'offre a fait l'objet d'une publicité limitée.[2]

d) Les titulaires de charges publiques et leurs fonctions en dehors de leur charge publique

Comme nous l'avons expliqué au chapitre 7, le problème des fonctionnaires qui occupent simultanément deux postes ou plus a été l'une des premières questions à faire l'objet d'un décret lorsque le gouvernement du Canada a entrepris la rédaction de règles à ce sujet. Les lignes de conduite touchant les personnes nommées par le gouverneur en conseil et les lignes directrices à l'intention des ministres de la Couronne sont très claires à ce sujet. On peut y lire que les personnes concernées par ces directives ne peuvent, pendant qu'elles occupent leurs postes, exercer une profession ou entreprendre la gestion ou l'exploitation d'une entreprise ou d'un commerce. Elles ne peuvent non plus conserver ou accepter un poste d'administrateur dans une société commerciale.

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1 O.P. Dwivedi, "A Code of Conduct for Civil Servants", The Dalhousie Review, 44, No. 4, (1964-1965), p. 454-455.

2 Report of the Interdepartmental Committee on Conflicts of Interest (Jean Boucher, Président), 1972, p. 2.

En général, selon les lignes directrices actuelles, les fonctionnaires ont le droit d'occuper un poste à l'extérieur du gouvernement lorsque cela n'est pas spécifiquement interdit ou ne va pas à l'encontre de leurs fonctions officielles. Néanmoins, cette disposition ouvre la porte de façon évidente à des interprétations ambiguës et qui, à juste titre, peuvent prendre beaucoup d'ampleur. Par exemple, prenons le cas d'un fonctionnaire qui occuperait un second emploi au cours de la nuit, lequel n'entrerait nullement en conflit avec la nature du poste occupé pendant la journée au gouvernement. Malgré tout, il serait en situation de conflit d'intérêts s'il devait récupérer au bureau pendant la journée et ne pas fournir les efforts exigés.

Une situation de conflits d'intérêts peut apparaître ou sembler apparaître lorsque les activités d'un employé accroissent les intérêts financiers de son employeur à temps partiel. Au nombre des situations conflictuelles qui peuvent être incluses dans cette catégorie, citons les cas où, en raison d'un second emploi ou d'un emploi à son compte, l'employé ne manifeste qu'un intérêt et un dynamisme mitigés dans le cadre de son travail au gouvernement; les cas où un emploi à l'extérieur du gouvernement peut obliger le fonctionnaire à utiliser des services ou des biens du gouvernement (le téléphone et les fournitures du bureau, par ex.); les cas où un fonctionnaire occupant un poste à l'extérieur du gouvernement agit de façon telle qu'il donne l'impression que ses actes ont une nature officielle ou qu'il est un représentant d'un point de vue officiel du gouvernement.[3]

Il y a pourtant des situations où certains types d'emplois rémunérés à l'extérieur du gouvernement peuvent être dans l'intérêt de la fonction publique et dans l'intérêt professionnel du titulaire d'une charge publique. Comme il est indiqué dans le "Report of the Interdepartmental Committee on Conflict of Interest" (1972) (p. 3) des hauts fonctionnaires sont parfois invités à donner des conférences, en particulier dans les universités de la région de la Capitale nationale, sur des questions non confidentielles et qui n'ont pas trait aux politiques en cours au gouvernement. Non seulement leur prestation a-t-elle un rapport avec leur travail dans la fonction publique, mais elle leur donne l'occasion de se tenir au courant de l'évolution des idées dans la société.

La récente proposition concernant le travail à temps partagé, selon laquelle les fonctions de nombreux employés fédéraux seraient remplies par deux personnes au lieu d'une, divisant ainsi le nombre d'heures de travail, est quelque peu préoccupante. Cette idée en est toujours au stade de proposition

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3 Kenneth Kernaghan, Comportement professionnel: directives à l'intention des fonctionnaires, op. cit., p. 15.

mais ses conséquences en ce qui a trait aux conflits d'intérêts sont évidentes. Le travail à temps partagé signifierait que des fonctionnaires de niveaux intermédiaires travailleraient pendant deux à trois jours par semaine (ou cinq demi-journées par semaine) et disposeraient ainsi de beaucoup de temps libre. Étant donné leur intérêt, leur motivation et leurs connaissances, on peut prévoir qu'avant peu certains chercheraient un emploi à l'extérieur du gouvernement, peut-être en créant leur propre firme d'experts-conseils. Il est raisonnable de s'attendre à ce que ce travail ressemble beaucoup à celui qu'ils effectuent pour le gouvernement. Le problème de "l'après-mandat" aurait donc des répercussions quotidiennes dans toute la fonction publique.

La restriction actuelle relative au travail à l'extérieur du gouvernement concerne l'utilisation non autorisée par un employé de renseignements obtenus au cours de son travail au gouvernement et les conflits réels ou éventuels auxquels peuvent donner lieu des activités professionnelles à l'extérieur du gouvernement. Même si certains ministères ont imposé des restrictions à cet égard qu'ils ont inscrites dans leur code d'éthique complémentaire, d'autres ont indiqué qu'ils avaient des difficultés à formuler des lignes directrices claires sur ces questions. L'objectif recherché par ces lignes directrices est d'être équitable envers le travailleur et l'employeur, tout en encourageant la recherche, la participation à des associations professionnelles et les échanges intellectuels avec la collectivité.

Actuellement, les fonctionnaires n'ont pas à demander la permission du sous-chef pour travailler à l'extérieur du gouvernement (sauf dans les cas où ce travail supplémentaire se fait dans un autre ministère), et l'établissement d'une telle exigence provoquerait assurément des réactions négatives considérables parmi les fonctionnaires. Néanmoins, ce point pourrait très bien être mis en lumière dans les codes d'éthique complémentaires qui pourraient au moins mentionner de façon claire la question du travail à l'extérieur et encourager les employés à obtenir l'assentiment du sous-chef. L'obtention d'une telle autorisation pourrait contribuer à éliminer toute suggestion de manquement à l'éthique.

Le problème des titulaires de charges publiques occupant des postes à l'extérieur du gouvernement n'est pas toujours une question où les intérêts publics et privés sont clairement définis. Dans bien des cas, la fonction publique du Canada est l'employeur qui dispose des plus grands moyens pour attirer des personnes possédant certaines compétences (quand ce n'est un monopole virtuel). Il semblerait donc qu'il est dans l'intérêt public que les fonctionnaires soient autorisés à offrir leurs services et connaissances au secteur privé lorsqu'ils ne sont pas au service du gouvernement. Cela est vrai tout particulièrement d'Environnement Canada, qui abonde en personnel technique et scientifique.

Le ministère de l'Environnement a le mandat d'encourager et d'aider le développement de nombreuses ressources scientifiques et, dans le cadre de ces activités, de sensibiliser le public à ce sujet. Il s'en acquitte en accordant des subventions, des ententes et des contrats au secteur privé, en offrant des services d'experts-conseils, en classant les renseignements disponibles et en mettant sur pied des programmes éducatifs et de publicité. Certaines contraintes financières et de personnel pèsent cependant sur lui et d'aucuns prétendent qu'il lui serait possible d'atteindre certains de ses objectifs en autorisant ses employés à offrir leurs services au secteur privé après leurs heures de travail.

Les lignes directrices en vigueur semblent être tellement strictes que le Ministère, dans certains cas, ne peut à peu près pas permettre à ses fonctionnaires d'occuper à l'extérieur du gouvernement un poste dans le même domaine que leurs fonctions officielles. Non seulement la conduite des titulaires de charges publiques doit-elle être irréprochable dans les faits, mais l'acceptation d'un poste à l'extérieur du gouvernement ne doit pas pouvoir donner naissance à un quelconque soupçon sur leur conduite. Prenons à titre d'exemple cette recommandation formelle des lignes directrices: "Il ne suffit nullement qu'une personne qui occupe un poste de responsabilité dans la fonction publique observe la loi. Il lui faut non seulement se conformer à la loi, mais avoir également une conduite si irréprochable qu'elle puisse résister à l'enquête la plus minutieuse..." On trouve aussi des sections de phrases comme "semble y avoir", "semble se servir de", "puisse être présumé" et "mettre en doute". En raison de la sévérité et de la grande portée des lignes directrices, il est virtuellement impossible pour certains employés de ne pas se trouver en situation de conflits d'intérêts s'ils acceptent un poste à l'extérieur de la fonction publique qui est de la même nature que celui qu'ils occupent à Environnement Canada et ce, peu importe que ces employés soient consciencieux et que, selon le Ministère, les Canadiens profiteraient de telles activités à l'extérieur du gouvernement.

Le Ministère emploie des météorologistes et des techniciens en météorologie. À Halifax, un employé d'une de ces deux catégories a cherché à obtenir un travail à temps partiel avec une entreprise privée canadienne qui fournit à des entreprises d'exploitation pétrolière des prévisions météorologiques ponctuelles. Les entreprises privées de prévisions météorologiques constituent une toute nouvelle industrie sur la côte Atlantique et ce, même si des compagnies américaines offrent déjà ce service. L'aptitude concurrentielle des entreprises canadiennes dépend de leur capacité d'embaucher à temps partiel des météorologistes du gouvernement du Canada pour compléter le travail fait par leurs employés à temps plein. Le Ministère a été informé que si l'employé en question accepte ce poste à l'extérieur du

gouvernement, il se trouvera en situation de conflits d'intérêts. Puisque l'éventuel employeur fait appel aux services météorologiques du Service de l'environnement atmosphérique, il est concevable de penser qu'il pourrait profiter d'un traitement préférentiel s'il appelait le Service et qu'il communiquait avec l'employé qu'il embauche à temps partiel. Cela placerait l'employé dans une situation ou il serait redevable à quelqu'un qui pourrait bénéficier d'un avantage spécial ou obtenir des faveurs ou encore qui pourrait chercher à jouir d'un traitement spécial, ce qui est contraire aux lignes directrices sur les conflits d'intérêts. La capacité de l'employé à s'acquitter de ses fonctions de façon honnête pourrait être mise en doute. Il est possible aussi que si cet employé appelle le service gouvernemental pour obtenir des renseignements lorsqu'il travaille pour la compagnie privée, ses confrères de travail lui accorderont un traitement préférentiel (du moins cela pourrait sembler être le cas).

Le météorologiste, dans l'exécution de ses fonctions, obtient des renseignements qu'il utilise pour prédire les conditions météorologiques. Lorsqu'il termine sa journée de travail au gouvernement, il emporte chez son employeur à temps partiel des renseignements qu'il a obtenus pendant la journée et dont il se servira pour préparer les prévisions météorologiques de la compagnie privée. La direction du Ministère ne juge pas qu'il s'agit là d'une conduite répréhensible. Néanmoins, les lignes directrices sont formelles et indiquent que le titulaire de charge publique ne doit pas profiter ou sembler profiter de renseignements obtenus pendant l'exécution de ses fonctions officielles (renseignements que le public ne pourrait obtenir normalement).

Dans de nombreuses villes canadiennes, le Service de l'environnement atmosphérique fournit gratuitement les prévisions météorologiques aux stations de radio. Il n'est pas certain qu'une station de radio obtiendra un météorologiste en particulier lorsqu'elle appelle le Service. Cependant, certaines stations aimeraient bien que ce soit toujours le même météorologiste qui présente les prévisions car il pourrait être identifié à la station. D'autres voudraient un météorologiste en particulier, en raison de sa voix ou de sa technique de présentation. Afin de s'assurer leurs services, quelques-uns ont cherché à embaucher certains d'entre eux pour qu'ils présentent après leurs heures de travail les prévisions de la météo sur les ondes.

Le Ministère favorise un tel type de travail à l'extérieur du gouvernement pour diverses raisons. Environnement Canada est responsable de la diffusion des prévisions météorologiques et il a besoin de l'aide des médias d'information privés pour faire ce travail et se réjouit que ceux-ci désirent y prendre part. La direction du Ministère considère que la science de la météorologie est ainsi mieux servie et que la perception qu'en a le public s'en trouve rehaussée si ce sont des météorologistes qui font la

présentation des prévisions au lieu d'annonceurs. Pour des raisons financières et en raison du personnel disponible, le ministère ne croit pas pouvoir, ou même devoir garantir aux stations radiophoniques l'usage d'un météorologiste qui ferait la présentation des prévisions pour une station en particulier. En général, le ministère ne s'oppose pas à ce que ses météorologistes occupent un second poste de ce type puisqu'ils servent les intérêts du ministère et font connaître la science de la météorologie. Il n'en demeure pas moins que les employés qui acceptent un tel travail risquent de se trouver en situation de conflits d'intérêts.

Il ne fait aucun doute que les éventuels employeurs sont très intéressés par ces météorologistes parce qu'ils travaillent pour le Service de l'environnement atmosphérique. Lorsque les stations radiophoniques préparent leur bulletin météorologique du matin, elles consultent les météorologistes en fonction au service de la météo. (Les bureaux sont ouverts 24 heures par jour). Il est possible, surtout si le météorologiste du gouvernement rémunéré par la station est un superviseur, qu'un confrère de travail lui accorde un traitement préférentiel (ou cela pourrait sembler être le cas). On peut voir qu'une infraction apparente aux lignes directrices ne constitue pas nécessairement un méfait ou un geste de déloyauté à l'égard de l'intérêt public. En fait, cela pourrait très bien être tout à fait le contraire.

e) La nature du lobbying dans le système politique canadien

Nous nous sommes demandés dans ce rapport, lorsque nous avons abordé la question de la formulation ambiguë des lignes directrices, en quoi consistait le lobbying dans le système politique canadien. Il est en effet indiqué dans les lignes directrices concernant les emplois ultérieurs que les ministres ne doivent pas, au cours des deux années qui suivent l'abandon de leurs fonctions, exercer des pressions en faveur ou au nom d'une personne ou d'une société commerciale auprès du ministère ou organisme gouvernemental dont ils étaient responsables au cours des deux dernières années de leur mandat.

Le problème du lobbying est très difficile à aborder car il n'en existe pas de définition claire et précise, sur laquelle tout le monde s'entend. La pratique du lobbying a débuté à la Chambre des communes britannique où dans une grande antichambre, des personnes ayant des intérêts particuliers pouvaient rencontrer les législateurs avant leur entrée en Chambre afin de les convaincre de la nécessité d'appuyer une cause particulière ou de considérer une question sous un certain angle. Aux États-Unis, au cours du XIX^{e} siècle, le lobbying et ceux qui s'y adonnaient ont acquis une piètre réputation qui persiste encore de nos jours. Même si le lobbying peut être une force constructive (qui permet de fournir des renseignements, des contacts et de nouvelles perspectives), on craint qu'il puisse cacher des arrière-

pensées. Le lobbying est une pratique plus respectable maintenant et, aux États-Unis, les "lobbyists", agissent ouvertement à titre de représentants attitrés de leurs employeurs en témoignant devant les comités législatifs et les organismes de réglementation et en fournissant souvent des renseignements utiles sur des questions complexes.

On pourrait dire que les anciens ministres qui fournissent des renseignements ou des avis au gouvernement de façon à réaliser certains objectifs de politique publique agissent plutôt à titre de conseillers et ne tentent pas d'exercer des pressions. Néanmoins, la recherche de privilèges spéciaux ou d'un traitement préférentiel est tout à fait inacceptable. Il faut aussi déterminer si la personne agit ainsi contre rémunération.

L'alinéa 110(1)a) du Code criminel interdit à tout "fonctionnaire" d'accepter, directement ou indirectement toute forme d'avantages en considération d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou d'une omission concernant tout sujet d'affaires ayant trait au gouvernement ou une réclamation contre le gouvernement ou tout avantage que le gouvernement a le droit d'accorder. Cette infraction vise les personnes occupant des postes officiels qui offrent de se servir de leurs charges pour influencer les décisions du gouvernement, qu'ils en soient capables ou non (cette infraction est souvent appelée trafic d'influence). Elle est utile lorsqu'il s'agit de déterminer les limites permises en ce qui a trait au lobbying.

L'article 108 du Code criminel interdit à tout membre du Parlement d'accepter, par corruption, ou d'être d'accord pour accepter "de l'argent, une contrepartie valable, une charge, une place ou un emploi pour lui ou toute autre personne à l'égard d'une chose qu'il a faite ou omise ou qu'il doit faire ou omettre en sa qualité officielle."

La Loi sur le Sénat et la Chambre des communes au paragraphe 23(1) interdit à tout membre du Sénat ou à tout député à la Chambre des communes de recevoir une rémunération pour services rendus relativement à toute affaire devant le Parlement ou de tenter d'influencer un membre du Parlement. De plus, en vertu du règlement numéro 14 de la Chambre, les députés n'ont pas le droit de voter sur une question dans laquelle ils ont des intérêts pécunaires et le vote de tout député ainsi intéressé doit être rejeté.

On peut lire dans Règlement annoté et formulaire de la Chambre des communes du Canada de Beauchesne qu'il est interdit aux députés d'accepter des honoraires pour services professionnels liés aux délibérations ou aux mesures du Parlement. De plus, selon Beauchesne, l'usage parlementaire défend aussi à un député de donner, en qualité d'expert conseil rémunéré, un avis motivé sur tout bill privé dont le Parlement est saisi.

Les discussions sur le thème du lobbying portent traditionnellement sur les relations que les groupes d'intérêt entretiennent avec les législateurs. Il semble qu'au Canada on donne au terme "lobbying" un sens plus large qui englobe les représentations et les interventions auprès de fonctionnaires responsables d'un dossier particulier. Il n'y a peut-être pas actuellement de loi devant le Parlement qui tient compte de la sollicitation par représentation ou par intervention. En conséquence, la personne exerçant des pressions sur les fonctionnaires ne cherche alors qu'à obtenir une interprétation favorable des dispositions en vigueur, un changement aux règlements ou ne sollicite qu'un examen attentif de sa demande en regard des programmes et services actuels.

Nous avons aussi pris note de l'expérience américaine en ce qui concerne l'enregistrement des personnes pratiquant le lobbying et de l'établissement au Royaume-Uni de nouvelles règles en ce domaine à la suite de pressions croissantes. La question a été discutée au Canada en 1973 dans un Livre vert intitulé Les membres du Parlement et les conflits d'intérêts. En conclusion, nous pouvons seulement affirmer à ce stade-ci que la définition ou la signification du mot "lobbying" demeure confuse et en conséquence nous recommandons que ce mot ne soit pas utilisé dans aucune règle d'éthique au niveau fédéral. Il faudrait choisir d'autres mots dont la signification est claire et le champ d'application reconnue lorsqu'on aborde le problème des conflits d'intérêts. Nous n'avons utilisé à aucun endroit le mot "lobbying" dans les règles reformulées que nous présentons dans ce rapport.

f) Application des lignes directrices aux conjoints et aux autres membres de la famille

Au cours de nos audiences et de nos discussions, la question de l'application des lignes directrices relatives aux conflits d'intérêts aux conjoints et aux autres membres de la famille des ministres, particulièrement celles exigeant que les ministres se départissent de certains éléments d'actif, a été soulevée à maintes reprises. Pour certains, l'application de lignes directrices à ces personnes semble raisonnable et dans l'intérêt du public. Pour d'autres, elle est extrêmement inéquitable.

En fait, il y a deux écoles de pensée distinctes qui s'opposent sur cette question. L'une prêche une plus grande ouverture du gouvernement et une plus grande honnêteté chez les titulaires de charges publiques conjuguées à des lois plus strictes en matière de conflits d'intérêts.

L'autre correspond au mouvement féministe ou de libération des femmes, qui met l'accent sur le droit des femmes à une carrière. Même si le terme "conjoint" dans les lignes directrices sur les conflits d'intérêts s'applique autant à un homme qu'à une

femme, la plupart des ministres, par le passé, ont été des hommes et, tout récemment encore, la plupart de leurs épouses n'avaient pas de carrière distincte même si certaines détenaient des portefeuilles de valeurs. Dans notre société contemporaine, un ministre, qu'il soit homme ou femme, aura probablement un conjoint menant une carrière distincte de son côté.

Les lignes directrices émises en 1979 par le Premier ministre Clark concernant les ministres comportaient des restrictions relatives aux conjoints et aux enfants à charge qui ont donné lieu à des contestations. Au moins une épouse de ministre a refusé initialement que ses avoirs financiers personnels et distincts soient régis par ces lignes directrices. Le Premier ministre a alors dû intervenir personnellement pour qu'elle accepte de s'y conformer. Les lignes directrices publiées en 1980 à l'intention des ministres revenaient à la position antérieure. Voici l'opinion du leader du Nouveau Parti Democratique à ce sujet:

> Les conjoints et les enfants à charge sont exemptés expressément de l'application des lignes directrices de 1980. Cela reflète l'opinion que chaque conjoint peut souhaiter poursuivre sa propre carrière. Parce qu'ils mènent chacun une carrière distincte, on exige maintenant que soient divulgués les renseignements financiers sur un seul d'entre eux. Cette vision des choses est erronée. En dépit de carrières distinctes, le mariage demeure en partie une union économique, une association d'égal à égal. Il a été reconnu à divers degrés dans les réformes apportées au droit de la famille que chaque conjoint peut avoir un intérêt pécuniaire dans les activités économiques de l'autre conjoint au cours du mariage (ou après le mariage). Les dispositions sur les conflits d'intérêts ne devraient pas ignorer ce fait.

Un ancien ministre nous a indiqué que les personnes qui sont nommées ministres deviennent un "bien public" et que, comme elles se sont lancées en politique en toute connaissance des faits, elles doivent s'attendre à ce que le régime d'application des règles sur les conflits d'intérêt ne s'intéresse pas uniquement à elles mais aussi à leur conjoint et à leur famille immédiate.

Dans notre examen des dispositions provinciales et territoriales en ce domaine, nous avons constaté qu'exception faite du Manitoba, de la Nouvelle-Écosse et de l'Île-du-Prince-Édouard, les règles sur les conflits d'intérêts s'appliquent aux membres de la famille, mais que la nature et la portée de cette application varient. Par exemple, en Ontario et au Québec, les règles s'appliquent au conjoint et aux enfants d'âge mineur; au Nouveau-Brunswick, au conjoint et aux enfants à charge; à Terre-Neuve, au conjoint et aux enfants par mariage; en Saskatchewan, au conjoint et aux enfants à charge, mais seulement s'ils agissent au

nom du membre de l'assemblée législative; en Alberta, au conjoint (à moins qu'il ne soit légalement séparé) et aux enfants à charge; au Yukon, au conjoint et aux personnes à charge habitant avec un ministre; dans les Territoires du Nord-Ouest, enfin, les règles s'appliquent au conjoint, aux enfants à charge ou à tout parent demeurant dans la même maison.

Selon nous, les règles telles qu'elles sont stipulées dans les lignes directrices actuellement applicables aux ministres constituent un juste équilibre et un compromis équitable entre les intérêts opposés en ce domaine. Les lignes directrices de 1980 ne s'appliquent pas directement aux conjoints ou aux enfants à charge des ministres, mais elles précisent ce qui suit:

> Mais il va sans dire que les ministres ne doivent pas transférer à leur épouse ou leurs enfants à charge leurs biens pour se soustraire aux exigences desdites lignes directrices. Les ministres doivent également prendre les moyens pour éviter les conflits d'intérêts comme ceux auxquels pourraient donner ou paraître donner lieu certains biens ou investissements que leurs conjoints ou enfants à leur charge possèdent ou gèrent, en partie ou en totalité.

La formulation de cette disposition pourrait être clarifiée quelque peu et devrait être incluse dans les procédures visant à minimiser les conflits d'intérêts.

Les ministères ont indiqué qu'ils éprouvent certaines difficultés à décider de la procédure à suivre en ce qui concerne les avoirs des membres de la famille qui risquent de créer des conflits d'intérêts pour les employés. Même si ces avoirs n'ont pas à être déclarés, il peut y avoir des cas où les employés eux-mêmes jugent qu'ils les placent dans une situation réelle ou potentielle de conflits d'intérêts par rapport à leur poste ou leurs fonctions. On encourage les employés à se conformer à l'esprit des lignes directrices et à agir "d'une façon consciencieuse et honnête qui puisse résister à l'examen public le plus minutieux" et à avoir recours à la déclaration pour témoigner de leur bonne foi.

L'application des lignes directrices sur les conflits d'intérêts dans le secteur public doit se faire avec discernement car il faut s'assurer que les droits des conjoints et des autres membres de la famille sont respectés. Néanmoins, tous les employés devraient être au courant de la nécessité d'examiner attentivement et de divulguer au besoin les avoirs et toutes les activités commerciales du conjoint (actuels ou à venir) qui pourraient être considérés incompatibles avec les fonctions officielles de l'autre conjoint travaillant au gouvernement. La cession des éléments d'actifs au conjoint ou aux membres de la famille immédiate de l'employé ne doit pas être faite pour éviter

de se conformer aux exigences des lignes directrices. Nous recommandons que tous les codes d'éthique des ministères clarifient le processus de déclaration concernant les avoirs et les activités commerciales du conjoint et des autres membres de la famille.

g) Renseignements confidentiels et obligation de témoigner

Au cours de nos travaux, nous avons examiné la question de l'utilisation de renseignements obtenus par l'entremise de la filière gouvernementale pour des raisons non officielles. Voici nos observations à ce sujet.

1. Obligation de témoigner

Plusieurs employés du Bureau de la sécurité aérienne du ministère des Transports ont présenté un rapport abordant la question des employés qui sont assignés à comparaître à titre de témoins experts lors d'enquêtes sur des accidents aériens. Ils craignent que leur témoignage puisse entrer en conflit avec leurs fonctions car: 1) leur témoignage risque de sembler mettre en danger l'objectivité et l'impartialité qu'on attend d'eux dans l'exécution de leurs fonctions; et 2) ils peuvent être appelés à témoigner en s'appuyant sur leurs propres conclusions, ce qui peut les amener à se servir de renseignements confidentiels obtenus à la condition qu'ils ne soient utilisés que par le Bureau de la sécurité aérienne.

Même si le mandat du Ministère et des tribunaux n'est pas le même, cela ne signifie pas nécessairement qu'il existe un conflit d'intérêts entre les deux. Le ministère des Transports a la responsabilité de mener des enquêtes sur les accidents aériens afin d'améliorer la sécurité du public. L'objectif recherché n'est pas de rejeter la responsabilité d'un accident sur quelqu'un ou quelque chose. Néanmoins, il est tout à fait naturel et normal que les éléments de preuve accumulés à la suite d'une enquête minutieuse soient utilisés dans la détermination de la responsabilité. La cour, par contre, a comme premier objectif de servir les fins de la justice, et à cette fin, elle impute la responsabilité des accidents et accorde des dommages et intérêts. La Couronne a aussi comme responsabilité d'appuyer les fins de la justice, de la loi et des tribunaux. En conséquence, les employés de la Couronne sembleraient avoir la responsabilité d'aider, lorsque cela est possible, les tribunaux dans la recherche de solutions équitables. On pourrait faire valoir, comme principe fondamental de la loi, que le gouvernement se doit de mettre toutes ses ressources (y compris ses spécialistes) à la disposition des tribunaux pour les aider à rendre des décisions justes.

La Loi sur le Bureau canadien de la sécurité aérienne (le projet de loi C-163, adopté par la Chambre des communes le 24 octobre 1983) aborde spécifiquement la question de l'utili-

sation de renseignements obtenus au cours d'une enquête. On peut lire à l'article 23:

> 23.(1) À l'issue de son enquête sur un fait aéronautique, le Bureau fait rapport de ses conclusions et, sous réserve des restrictions visant la sécurité nationale mentionnées au paragraphe 13(3) et au paragraphe 13(4), rend public le rapport, en y incorporant dans la mesure du possible ses recommandations, fondées sur ces conclusions touchant la sécurité aérienne.

Les paragraphes 29(3) et 29(4) stipulent que:

> (3) Le règlement d'application du paragraphe (1) doit, dans le cas des personnes qui fournissent des renseignements sur des faits aéronautiques de façon facultative, et peut, dans le cas de celles qui les fournissent de façon obligatoire, comporter des dispositions prévoyant la protection de l'identité de ces personnes.
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> (4) Par dérogation à toute autre loi ou règle de droit, nul ne peut être requis de déposer en justice, dans le cadre de procédures judiciaires, disciplinaires ou autres, lorsque ce témoignage peut permettre d'identifier les personnes qui ont informé le Bureau conformément au règlement d'application du paragraphe (1), dans le cas où cette identité est protégée par les dispositions visées au paragraphe (3).

Dans une situation similaire, les médecins sont souvent appelés à témoigner à titre de témoins experts pour des affaires relevant du droit civil. La profession médicale n'a pas pour fonction d'aider les demandeurs à obtenir une compensation (ou de les en empêcher). Elle reconnaît néanmoins que ses connaissances très spécialisées sont souvent essentielles à la recherche d'une conclusion équitable dans les affaires de droit civil. Il faudrait prendre note que le Code de déontologie de l'Association médicale canadienne déclare que les médecins, lorsqu'ils agissent à titre de témoins, ont la responsabilité "d'aider la cour à rendre une décision juste". L'accent est mis sur la nécessité de servir les intérêts de la justice et pas nécessairement les intérêts pécuniaires des clients.

Même si nous ne croyons pas qu'il s'agisse d'un problème de conflits d'intérêts, il n'en demeure pas moins qu'il y a utilisation de renseignements confidentiels à d'autres fins.

2. Utilisation de renseignements confidentiels

La Loi sur l'accès à l'information protège certains types de renseignements contre la possibilité qu'ils soient révélés au public en général. Il y a exactement 54 lois qui contiennent de telles dispositions restrictives. L'article 114 de la Loi sur l'assurance-chômage (discutée aussi au chapitre 8) est un exemple d'une disposition de ce type:

> Ne doivent avoir accès aux renseignements écrits ou verbaux obtenus de quiconque par la Commission ou le ministère de l'Emploi et de l'Immigration en vertu de la présente loi ou d'un règlement y afférent que les employés de la Commission ou dudit ministère dans l'exercice de leurs fonctions et les autres personnes à qui le Ministre juge souhaitable d'en permettre l'accès. Ni la Commission ni ledit ministère ni aucun de leurs employés ne peuvent être contraints de répondre à une question concernant ces renseignements ni de produire des registres, documents ou autres pièces contenant ces renseignements à titre de preuve dans des procédures sans rapport direct avec l'exécution ou l'interprétation de la présente loi ou des règlements. (1976-77, chapitre 54, paragraphe 60(1)).

3. Serments de discrétion - Contraintes à témoigner au moyen d'une assignation à comparaître

Nous nous sommes demandés si le serment de discrétion que prête une personne lors de sa nomination à un poste est suffisant pour lui permettre de ne pas être contrainte à témoigner devant une cour.

La question de savoir si un serment lie la personne qui l'a prêté ou s'il y a obligation du point de vue moral seulement ne manque pas d'intérêt, surtout dans le contexte suivant: Peut-on se fier suffisamment au serment de discrétion ou à la déclaration solennelle que les titulaires de charges publiques doivent faire (et, au besoin, en assurer le respect et l'application au moyen d'une injonction prohibitive) pour empêcher la divulgation de renseignements confidentiels au cours de la période après-mandat?

La question a été discutée de façon exhaustive en Angleterre lors de l'affaire des Crossman Diaries. Le Lord Juge en chef s'est alors interrogé sur le serment des membres du Conseil privé dans le contexte de la publication du journal intime d'un ancien ministre où il divulguait des renseignements confidentiels obtenus au moment où il était ministre. Le Juge en chef se demandait si la cour avait le pouvoir d'en empêcher la publica-

tion.[4] Pour une variété de raisons, la cour a refusé d'accorder une injonction interdisant la publication.

On a tenté de prouver dans cette affaire que le serment prêté par M. Crossman à titre de membre du Cabinet aurait été violé par la publication de renseignements confidentiels et ce, même si "on ne pouvait se fier totalement à ce serment". Le Lord Juge en chef a déclaré que le procureur-général devait d'abord montrer que, quelle que soit l'obligation de confidentialité ou de discrétion à laquelle les anciens ministres devaient se soumettre, il s'agissait d'une obligation légale et non simplement d'une obligation morale."[5]

Cette distinction risque de poser des problèmes d'application si les cours sont disposées à considérer que l'obligation est essentiellement morale et non légale. Il est intéressant de connaître la définition du mot "serment" donnée récemment par David M. Walker, professeur de droit à l'Université de Glasgow: "Une affirmation ou promesse faite avec la conviction qu'un châtiment surnaturel s'abattra sur la personne qui viole les engagements qu'elle a juré de prendre."[6]

La caractéristique essentielle de la définition de Walker est que la personne qui prête faussement serment s'expose à "un châtiment moral surnaturel". Wigmore, dans son livre Evidence in Trials at Common Law (1976), traite de l'influence surnaturelle qui contribue à la poursuite de la vérité dans l'acte du serment.[7] La force fondamentale du serment émane de cette sanction surnaturelle: "l'essence d'un serment est un appel lancé à l'Être suprême en qui la personne prêtant serment croit et en qui elle voit celui qui récompense la vérité et punit le mensonge".[8]

Nous pouvons maintenant comprendre pourquoi le Lord Juge en chef Widgerey a suggéré dans l'affaire Jonathan Cape que le serment n'avait aucun pouvoir de contrainte du point de vue de la loi. Cela ne veut pas dire que la personne qui fait un faux serment ne risque pas de s'exposer à d'éventuelles représailles

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4 Attorney-General v Jonathan Cape Ltd., (1975) 3 All E.R. 484.

5 Ibid., p. 492-493.

6 David M. Walker, The Oxford Companion to Law (1980), p. 896.

7 Wigmore, Evidence in Trials at Common Law (1976), p. 382 - 386, chapitre VI.

8 R. v. Defillipi, (1932) 1 W.W.R. 545, 546 (Alta. Canada).

judiciaires. Le Code criminel est des plus clairs au sujet du parjure:

1. Commet un parjure, "quiconque, étant témoin dans une procédure judiciaire, avec l'intention de tromper rend un faux témoignage, sachant que le témoignage est faux" (article 120);

2. Commet de fausses déclarations dans des procédures extra-judiciaires: (Est coupable d'un acte criminel), "quiconque, n'étant pas témoin dans une procédure judiciaire, mais ayant la permission, l'autorisation ou l'obligation, d'après la loi, de faire une énonciation par affidavit, par déclaration solennelle ou oralement sous serment, fait dans une telle énonciation, devant une personne autorisée par la loi à permettre que cette énonciation soit faite devant elle, une assertion qu'il sait fausse sur une question de fait, d'opinion, de croyance ou de connaissance" (article 122); et

3. Commet des infractions relatives au témoignage et aux affidavits présentés dans les procédures judiciaires (articles 124 à 127).

Ces articles du Code criminel ont probablement aussi pour effet d'encourager les personnes à dire la vérité. À ce sujet, l'opinion émise par Blackstone dans Commentaries on the Laws of England concernant le serment d'allégeance est intéressante:

> La sanction d'un serment, il est vrai, dans le cas d'une violation de devoir, rend le fardeau de la culpabilité encore plus lourd en ajoutant le parjure à la trahison: mais elle n'accroît pas l'obligation civile de loyauté; elle ne fait que renforcer le lien social en l'unissant avec celui de la religion. (soulignement ajouté).[9]

La durée du serment semble dépendre principalement de son libellé. Par exemple, le serment des membres du Conseil privé (présenté à l'annexe D) comporte une obligation "de garder le secret absolu sur les questions qui y seront traitées, débattues ou résolues sans en divulguer ni révéler le tout ou une partie". Mais nulle part dans le serment fait-on mention de la durée de cet engagement. Dans le contexte des principes constitutionnels qui accordent beaucoup d'importance à la solidarité du Cabinet et aux communications confidentielles entre les ministres et le souverain, l'absence de limite à la durée du serment et l'applicabilité

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9 Blackstone, Commentaries on the Laws of England, New York W.E. Dean, 1846, vol. I, livre I, p. 369.

de l'obligation aux anciens ministres et aux délibérations passées n'ont vraiment rien de surprenant.

h) Sanctions et pénalités

Il est important de déterminer si des sanctions ou des pénalités constituent un moyen dissuasif efficace ou une mesure appropriée permettant de faire respecter les lignes directrices en matière de conflits d'intérêts et, le cas échéant, de déterminer lesquelles sont efficaces.

Les lignes de conduite actuelles en matière de conflits d'intérêts à l'intention des titulaires de charges publiques contiennent peu de sanctions administratives ou légales spécifiques. On les encourage à respecter les principes d'éthique et les normes de conduite au moyen de la divulgation de renseignements financiers, de l'abandon de charges et du dessaisissement de biens. Dans le cas des anciens titulaires de charges publiques l'honneur et le choix personnel sont les critères préconisés pour déterminer l'applicabilité des lignes de conduite à leurs activités commerciales après leur mandat.

Néanmoins, des sanctions administratives pouvant aller jusqu'au renvoi sont utilisées par des ministères dans les cas de violation du code d'éthique. Les personnes nommées par le gouverneur en conseil, qui occupent un poste à titre amovible, peuvent faire face à des mesures disciplinaires identiques.

La loi américaine intitulée "Ethics in Government Act" (18USC #207) prévoit des amendes de 10 000 dollars ou l'emprisonnement pendant au plus deux années pour toute infraction à la loi. C'est l'Attorney General qui est exclusivement chargé de son application.

Dans les cas extrêmes de conflits d'intérêts, qui sont visés par le Code criminel, des peines encore plus sévères sont prévues pour les personnes reconnues coupables.

À part ces punitions, on ne retrouve que de vagues sanctions administratives ("pouvant aller jusqu'au renvoi"), comme nous l'avons indiqué auparavant. Un examen des mesures disciplinaires prises par le Conseil du Trésor a révélé que ces sanctions sont effectivement utilisées.

L'autre forme de punition utilisée consiste à rendre publics les cas de manquements aux lignes directrices sur les conflits d'intérêts. Il s'agit d'un moyen assez rudimentaire de rendre la justice et il peut avoir des répercussions autant sur les innocents que sur les coupables, mais malgré tout, il ne peut être écarté, car il aura une influence salutaire tant sur les contrevenants que sur les autres employés du secteur public. Pour les titulaires de charges publiques qui sont élus, les réper-

cussions d'une telle publicité peuvent être encore plus grandes que n'importe quelle autre punition car elles peuvent entraîner la fin d'une carrière politique.

La divulgation publique et systématique des cas de conduite contraires à l'éthique peut être une des facettes d'un système de sanctions. Les conseils arbitraux le font déjà en rendant publiques leurs décisions à la suite d'enquêtes approfondies sur des problèmes particuliers. La méthode employée par le Conseiller en éthique (voir chapitre 13) pour rendre publiques les conclusions de ses enquêtes peut favoriser l'utilisation de la publicité comme sanction.

i) Relations entre les secteurs public et privé

Un des points sur lequel le groupe de travail s'est attardé est la nécessité d'attirer au gouvernement des personnes de haut calibre de tous les secteurs d'activité tout en s'assurant que la confiance de la population dans le gouvernement est sauvegardée.

La question de la mobilité des personnes entre les secteurs privé et public a fait l'objet de beaucoup de discussions, surtout depuis la présentation en 1976 du rapport du Groupe d'étude des rapports entre l'entreprise et l'État intitulé Comment améliorer les relations entre l'entreprise et l'État au Canada. Le rapport Linking Canada's New Solitude publié par le Conference Board du Canada en juillet 1983 traite aussi de cette question et du Programme Échanges Canada pour les cadres. Au cours de nos rencontres avec des citoyens oeuvrant dans le secteur privé, nous avons pris conscience qu'il existe un fossé d'incompréhension entre les secteurs privé et public au Canada qui, généralement parlant, ne sert aucunement les intérêts de la population canadienne. Comme vous l'avez écrit dans la revue Canadian Business en août 1981, M. le Premier ministre, "Le roman canadien le plus connu ... Deux solitudes ... traite de l'isolation culturelle des anglophones et des francophones ... mais il existe deux autres solitudes ... le monde des affaires et le gouvernement".

Les gens d'affaires et les titulaires de charges publiques ne se connaissent pas suffisamment et ont peu d'information sur le milieu de travail de l'un et de l'autre. Dans le cas des cadres d'entreprises privées, la compréhension des structures du gouvernement est tout particulièrement importante pour ne pas perdre de temps à déterminer les centres de décisions et pour réduire les incertitudes. Les ministres et hauts fonctionnaires devraient être tout aussi bien renseignés sur le mode de fonctionnement de l'entreprise privée.

Le Groupe d'étude sur les rapports entre l'entreprise et l'État recommande ce qui suit:

d) il serait bon d'explorer systématiquement et en profondeur d'autres méthodes de recruter de bons éléments au sein du secteur des affaires, (au lieu de continuer à élargir les services publics) pour perfectionner les méthodes courantes de gestion du personnel. Ces méthodes qu'il ne faudrait pas utiliser dans le but de réduire les dépenses, comprendraient plus d'engagements à contrat pour des périodes déterminées et des solutions aux problèmes de transfert des crédits de pension et de sécurité sociale, etc.

   De même, les politiques actuelles du gouvernement qui nuisent aux échanges telles que le règlement relatif aux conflits d'intérêts et le droit de préférence des fonctionnaires dans les concours, devraient être revues pour réduire leur impact défavorable dans certains cas; et

e) il faudrait revoir les programmes actuels d'Échanges Canada et les cours et affections de perfectionnement des cadres pour étudier la possibilité d'élargir le contexte des échanges actuels et englober des représentants de syndicats, des instituts de recherche sans but lucratif et des grandes associations commerciales.

Le Programme Échanges Canada n'est pas une nouveauté. Le Conference Board du Canada, dans son rapport Linking Canada's New Solitude paru en juillet 1983, a examiné six projets d'échanges de personnel entre le gouvernement et le secteur privé qui ont été réalisés depuis le milieu des années 60. Le Conference Board fait remarquer que:

> Il y a quelque chose de curieux dans ces recommandations, car un tel programme existait déjà lorsque toutes ces déclarations ont été faites - le Programme Échanges Canada pour les cadres du gouvernement fédéral. Même si ce programme était en place lorsque toutes ces recommandations étaient formulées, il est demeuré relativement peu utilisé par le secteur privé si on le compare aux autres approches employées pour améliorer les relations entre le gouvernement et le secteur privé.

Nous avons rencontré plusieurs personnes qui ont participé au programme d'échanges des cadres et leur évaluation du rôle et de l'efficacité de ce programme est des plus positives. Nous avons aussi examiné des brochures décrivant le Programme Échanges Canada et le texte du protocole d'entente de ce programme afin de connaître ses dispositions relatives aux conflits d'intérêts. Il

existe deux types de protocole: un pour les participants qui proviennent du secteur privé, d'un gouvernement provincial ou municipal ou encore d'une société de le Couronne qui viennent travailler de façon temporaire à la fonction publique fédérale, et un autre pour les fonctionnaires fédéraux qui sont affectés dans le secteur privé, dans une université, dans un gouvernement provincial ou dans une société de la Couronne. Dans le second type de protocole d'entente, on ne fait aucune référence à la question des conflits d'intérêts. Les agents du Programme Échanges Canada accordent une grande importance à cette question lorsqu'ils discutent des modalités d'affectation avec les gestionnaires du ministère et les cadres du secteur privé. Il semble que les gestionnaires intéressés par le projet d'échanges de personnel sont conscients que des conflits peuvent survenir et s'assurent qu'il n'y en a pas. De plus, l'employé fédéral en affectation dans le secteur privé est toujours lié par son serment d'office et de discrétion. On n'a constaté aucun cas de conflit d'intérêts parmi les fonctionnaires fédéraux affectés provisoirement dans le secteur privé dans le cadre d'un programme d'échanges.

En ce qui concerne l'autre type de protocole, celui qui régit les personnes du secteur privé venant travailler dans le secteur public fédéral, on peut lire ceci dans le contrat:

> Il est convenu que l'affectation doit être considérée comme un "emploi" aux fins de la Loi sur les secrets officiels et que _____ sera assujetti à l'article 4 de ladite Loi, portant notamment sur la communication illicite de renseignements. Il est également convenu que les Lignes directrices concernant les conflits d'intérêt s'appliquent à _____ et que tout conflit d'intérêts réel ou éventuel devra être déclaré avant le début de l'affectation.

Le Manuel de gestion du personnel, dans la section traitant du programme d'échanges des cadres, stipule qu'"en choisissant l'affectation des cadres supérieurs ou avant d'accepter ceux-ci dans leurs rangs, les ministères doivent s'assurer que l'affectation ne compromet pas sérieusement la sécurité et ne comporte pas de conflits d'intérêts."

Le programme fédéral d'échanges des cadres semble bien fonctionner mais à l'intérieur d'une marge étroitement définie. Par exemple, une étude menée par la "Institute for Political Involvement" a révélé que, sur un échantillonnage de 703 entreprises, moins de cinq pour cent ont participé au programme d'échanges des cadres ou sa contrepartie pour les cadres intermédiaires, le programme Cours et affectation de perfectionnement. De plus, les programmes d'échanges offerts sont de courte durée. Nous sommes d'avis, et cela est important pour une amélioration générale des relations entre les secteurs privé et public, qu'il est nécessaire d'encourager les personnes du secteur privé

possédant les aptitudes requises à venir au gouvernement pour une plus longue période ou sur une base permanente. On pourrait aussi recruter auprès d'organismes professionnels et syndicaux et de sociétés commerciales.

Aucune mesure prise isolément ne permettra de combler le fossé d'incompréhension entre les deux nouvelles solitudes du Canada. Une gamme de mesures, notamment au niveau des politiques gouvernementales et des attitudes des façonneurs d'opinion au gouvernement et dans le secteur privé, doivent être mises de l'avant pour amener un changement ou permettre une amélioration dans ce domaine. Les règles actuelles en matière de conflits d'intérêts ne sont pas responsables de cet état de fait mais elles constituent peut-être un des facteurs qui contribuent dans certains cas à priver la fonction publique de personnes hautement compétentes. Nous ne cherchons pas à dire que ces règles devraient être éliminées, pas plus que nous insinuons que les personnes qui renoncent à venir travailler au gouvernement auraient de la difficulté à se conformer à l'éthique. Le problème est fonctionnel et provient de l'application mécanique des règles concernant le dessaisissement de biens ou les activités après-mandat dans des cas ou cette application n'est pas nécessaire et cause indûment des problèmes et des pertes financières. Les recommandations du présent rapport visent à atténuer ce problème particulier.

CHAPITRE 12

REFORMULATION DES RÈGLES

a) Vue d'ensemble

Les lignes directrices actuellement applicables aux ministres, aux membres du personnel soustrait, aux personnes nommées par le gouverneur en conseil et aux fonctionnaires sont une combinaison de deux ensembles: (1) ce que l'on peut appeler des principes de conduite et (2) des règles de procédure visant à minimiser les conflits d'intérêts, telles que les exigences relatives à la vente de certaines valeurs, au dessaisissement au moyen d'une fiducie, à la divulgation, etc.

Nous proposons que les lignes directrices actuellement applicables aux ministres, aux membres de leur personnel soustrait, aux personnes nommées par le gouverneur en conseil et aux fonctionnaires soient remplacées par ce qui suit:

1. Un code d'éthique. Ce code engloberait certains principes pris dans les lignes directrices en vigueur, reformulées de façon à incorporer d'autres principes de conduite, et tous les titulaires de charges publiques seraient tenus de s'y conformer.

2. Des règles de procédure visant à minimiser les conflits d'intérêts. Ces règles seraient énoncées sous la forme d'un règlement établi par le gouverneur en conseil. Elles seraient semblables à celles qui sont incluses dans les lignes directrices actuelles et qui concernent, entre autres, les activités prohibées, la déclaration publique et le dessaisissement de valeurs par la vente ou l'établissement d'une fiducie. La nouvelle formulation permettrait une application plus souple et plus fonctionnelle. Par "fonctionnelle" nous entendons que la portée et la teneur des règles de procédure seraient liées à la catégorie et à la classification des titulaires de charges publiques et, dans la mesure du possible, traduiraient les différences entre leurs fonctions et leurs responsabilités.

3. Des règles complémentaires. Il importerait d'établir des codes complémentaires et règles spéciales qui régiraient les conflits particuliers qui risquent de survenir au sein de divers ministères, sociétés de la Couronne et organismes gouvernementaux.

Ces trois ensembles seraient organisés selon une hiérarchie: le code d'éthique énoncerait des principes généraux; les règles de procédure établiraient la voie à suivre pour respecter ces principes; et les règles complémentaires régiraient, au besoin, les questions de détail. Ces trois ensembles devraient être compatibles, les règles de procédure et les règles complémentaires devant découler des principes du code, et il ne devrait exister aucun chevauchement entre les trois.

b) Problèmes découlant des règles énoncées dans les "lignes directrices"

Il y a des divergences de vues énormes quant à savoir si les lignes directrices ont un caractère exécutoire. Certains soutiennent que les lignes directrices ont force de loi et sont donc obligatoires, tandis que d'autres sont d'avis qu'elles sont simplement ce que leur nom dénote, c'est-à-dire une indication du comportement à adopter ou de la voie à suivre, mais qu'elles n'ont pas un caractère aussi obligatoire qu'une loi.

Cette ambiguïté au niveau de l'interprétation est susceptible de se produire autant chez ceux qui pensent et travaillent en français qu'en anglais, puisque "guidelines" se rend en français par "lignes directrices". Ce n'est toutefois pas la seule expression utilisée car, par exemple, on trouve également "lignes de conduite" relatives aux conflits d'intérêts touchant les personnes nommées par le gouverneur en conseil et "normes de conduite" touchant les fonctionnaires. Cet état de choses ne fait que renforcer notre idée qu'il serait préférable de laisser tomber les expressions "guidelines" et "lignes directrices" au moment de la reformulation des règles actuelles.

Dans le cas des lignes directrices en vigueur établies autrement que par décret, telles que celles élaborées par certains ministères et organismes, le caractère exécutoire peut être encore plus discutable. Cependant, pour ce qui est du fondement légal de ces lignes directrices ou de ces codes, le pouvoir de déterminer les règles orientant la conduite des fonctionnaires découle de l'alinéa 7(1)f) de la Loi sur l'administration financière, lequel autorise le Conseil du Trésor à "établir des normes de discipline dans la fonction publique". De plus, l'article 106 du Règlement sur les conditions d'emploi dans la Fonction publique, établi sous le régime de l'article 7 de la Loi sur l'administration financière, autorise un sous-chef à établir et à appliquer des normes de discipline, sous réserve de leur promulgation par le Conseil du Trésor.

Il n'en demeure pas moins que les problèmes d'interprétation subsistent, surtout parce que les lignes directrices ou les codes complémentaires sont formulés dans plusieurs cas sous la forme de recommandations, tendant à indiquer ce qui "devrait" être fait plutôt que ce qui "doit" être fait. À certains égards, il

est inévitable que des règles d'éthique soient énoncées de façon générale, et nous avons déjà fait valoir que cette voie est préférable à celle suivie par plusieurs autres juridictions, c'est-à-dire essayer de particulariser chaque problème imaginable et de le résoudre au moyen d'une règle précise. Nous ne contestons pas que certaines personnes peuvent trouver plus juste d'être soumises à des règles nettes, concises et circonscrites, de façon qu'elles puissent avoir recours à un conseiller juridique pour déterminer si elles ont violé ou non le code d'éthique. Les avocats préfèrent un langage précis; plusieurs conseillers juridiques du ministère de la Justice et d'autres ministères fédéraux ont fait ressortir, dans des mémoires qu'ils ont présentés, la nécessité d'éviter tout langage vague et ambigu afin que les gens puissent comprendre clairement en quoi consistent leurs droits.

Il ne s'agit pas d'un nouveau problème. Ce dilemme permanent puise sa source dans la tension qui existe entre deux écoles de pensée: la première met l'accent sur les droits légaux des individus et prône donc que les lois soient rédigés de la façon la plus rigoureuse et la plus précise possible; la seconde préfère une orientation administrative et une formulation générale permettant l'interprétation de chaque cas qui se présente. L'existence de la Charte des droits et libertés donne encore plus d'acuité au problème. Nous avons donc essayé de trouver le juste milieu. Nous préconisons un moyen terme entre les approches du légalisme et du pragmatisme, comme le démontre la formulation recommandée pour le code d'éthique.

c) Séparation des principes fondamentaux des lignes directrices actuelles

Les lignes directrices actuelles renferment un amalgame de règles et de procédures fondamentales en matière d'éthique. Les codes complémentaires établis par divers ministères et organismes sont plus complets et ajoutent à ces règles et procédures fondamentales une variété d'autres directives, règles et conseils.

Bien que nous reconnaissions qu'il soit commode, d'un point de vue administratif, que le directeur du personnel d'un ministère puisse remettre à un nouvel employé une simple brochure et l'inviter à y lire tout ce qu'il doit savoir sur les règles et procédures à suivre au sein du ministère, un tel document d'ensemble peut présenter deux inconvénients. Premièrement, certains sont tellement longs que bien souvent les employés ne les lisent pas. Nous ne contestons pas cependant l'utilité d'un ouvrage de référence en cas de besoin. Deuxièmement, le regroupement en un seul texte de dispositions, lignes directrices ou règles pouvant porter aussi bien sur le Code criminel et l'éthique que sur la ponctualité et la tenue vestimentaire tend à banaliser les questions les plus sérieuses.

Nous croyons qu'il serait préférable que les quelques principes de base généraux qui forment le cadre d'éthique fondamental ne soient pas incorporés dans un énoncé global des règles de conduite.

d) Code d'éthique

Le Code d'éthique que nous recommandons est une épuration des règles ou des principes de base qui ont été établis au niveau fédéral au cours des dix à quinze dernières années. Nous reconnaissons que beaucoup de temps et d'efforts ont été consacrés à leur formulation, et nous ne proposons pas de rejeter la teneur ou le libellé de ces principes. Toutefois, nous avons abrégé et rendu plus concises certaines formulations antérieures, et nous avons fait plusieurs ajouts afin de couvrir de nouveaux domaines qui pourraient être, à juste titre, placés sous le régime d'un code d'éthique général. En fait, nous avons fusionné le libellé actuel des lignes directrices fédérales avec les principes énoncés au chapitre 3 du présent rapport qui détermine les comportements qui ne conviennent pas aux titulaires de charges publiques et qui énonce les principes devant s'appliquer dans chaque cas. Le nouveau code d'éthique est formulé comme suit:

CODE D'ÉTHIQUE

Préambule

Servir son pays est une noble vocation. Quelle que soit l'importance de leurs fonctions, les titulaires de charges publiques portent une partie de la responsabilité de la destinée de leur pays et de la confiance que les Canadiens accordent à leur gouvernement.

La confiance de la population repose sur sa conviction que les titulaires de charges publiques ont une conduite conforme à l'éthique.

Pour servir ces préceptes, les principes de conduite suivants s'appliquent obligatoirement à tous les titulaires de charges publiques.

Principes

1. Il ne suffit nullement que les personnes détenant une charge publique au gouvernement du Canada observent la loi; elles doivent également avoir une conduite si irréprochable qu'elle puisse résister à l'examen le plus minutieux.

2. L'intérêt public doit toujours primer en cas de conflit entre les intérêts privés et les devoirs officiels des titulaires de charges publiques. Dès leur nomination, ceux-ci doivent prendre les dispositions nécessaires pour éviter tout conflit de cette nature.

3. Il est interdit aux titulaires de charges publiques de solliciter ou d'accepter, mis à part les cadeaux et l'hospitalité officiels d'une valeur nominale, un transfert de valeurs économiques de source privée, même s'il ne s'agit aucunement de corruption. Ce principe s'applique dans le cas où le transfert est facultatif, c'est-à-dire qu'il ne résulte pas d'un contrat ni d'un droit de propriété du titulaire de charge publique.

4. Il est interdit aux titulaires non élus de charges publiques, sans l'approbation préalable de leur supérieur, d'outrepasser leurs fonctions officielles pour venir en aide à des personnes, physiques ou morales, dans leurs raports avec le gouvernement.

5. Il est interdit aux titulaires de charges publiques de se servir à leur propre avantage de renseignements obtenus dans l'exercice de leurs fonctions officielles et qui, de façon générale, ne sont pas accessibles au public.

6. Il est interdit aux titulaires de charges publiques d'utiliser directement ou indirectement les biens du gouvernement, quels qu'ils soient, y compris les biens loués au gouvernement, ou d'en permettre l'usage, à des fins autres que des activités officiellement approuvées.

7. Il est interdit aux titulaires non élus de charges publiques de se livrer à des activités politiques partisanes qui puissent mettre en danger, réellement ou en apparence, la neutralité politique de la fonction publique.

8. Il est interdit aux titulaires non élus de charges publiques d'exprimer publiquement leur opinion personnelle sur des questions qui font l'objet d'une controverse politique ou sur les politiques ou l'administration du gouvernement (exception faite des questions concernant la négociation collective), si cela risque de diminuer la confiance du public à l'égard de la façon dont ils s'acquittent ou s'acquitteront de leurs fonctions ou si cela risque de nuire aux relations avec d'autres gouvernements.

9. Il est interdit aux titulaires de charges publiques d'exploiter l'autorité de leurs fonctions à des fins privées ou pour leur satisfaction personnelle, ou si cela risque de jeter le discrédit sur le caractère professionnel de la fonction publique.

10. Les anciens titulaires de charges publiques ont le devoir d'agir de façon à ne laisser planer aucun doute quant à la

probité et à l'impartialité de l'appareil gouvernemental et à ne diminuer d'aucune façon la confiance du public dans l'intégrité du gouvernement.

Le présent code engage tous les titulaires de charges publiques. À ses fins, l'expression "titulaires de charges publiques" désigne les agents et les employés de Sa Majesté du chef du Canada, et plus précisément, les ministres fédéraux, les secrétaires parlementaires, les personnes nommées par le gouverneur en conseil, les fonctionnaires, les membres du personnel soustrait de ministres, les cadres supérieurs, les administrateurs ou les employés des conseils, commissions, offices, tribunaux, sociétés de la Couronne et autres organismes fédéraux, les cadres supérieurs et les employés du Parlement du Canada, et les membres des Forces armées du Canada et de la Gendarmerie royale du Canada. L'expression "titulaires non élus de charges publiques" désigne tous les titulaires de charges publiques à l'exception des ministres, des secrétaires parlementaires et des membres du personnel soustrait des ministres.

e) Règles de procédure visant à minimiser les conflits d'intérêts

Nous recommandons également de s'inspirer des lignes directrices actuelles pour établir les règles et procédures qui contribueront à minimiser les conflits d'intérêts, en conformité avec les principes généraux énoncés dans le code d'éthique. Il en résulterait des "Règles de procédure visant à minimiser les conflits d'intérêts", qui pourraient prendre la forme d'un règlement d'application de la Loi sur l'éthique dans le secteur public.

Ces règles de procédure ressembleraient sans doute en grande partie aux lignes directrices actuelles et porteraient sur des questions comme le dessaisissement applicable à certains groupes (tels les ministres et les personnes nommées par le gouverneur en conseil), l'utilisation d'une fiducie, les dispositions relatives à la déclaration publique, la description des biens soustraits aux règles du dessaisissement, etc.

Nous devons souligner que les "Règles de procédure visant à minimiser les conflits d'intérêts" ne doivent pas être considérées comme un moyen de mettre en oeuvre le code d'éthique. Ce dernier, devant être promulgué par le Parlement, sera obligatoire pour tout le secteur public fédéral, et chacun aura la responsabilité personnelle de s'y conformer. Ce n'est pas au Conseiller en éthique ni au Bureau de l'éthique dans le secteur public qu'il incombera de "faire appliquer" le code, encore moins de s'assurer que tous et chacun s'y conforment.

De toute évidence, les titulaires de charges publiques de niveau supérieur, tels que les ministres, les sous-ministres, les chefs d'organismes et autres, ne pourraient pas, sur certains plans, se conformer aux principes généraux du code sans, en fait, avoir recours aux procédures de dessaisissement (essentiellement de la même façon qu'ils le font actuellement).

À notre avis, il n'entre pas dans nos attributions de recommander des règles de procédure détaillées visant à minimiser les conflits d'intérêts et adaptées à tous les titulaires de charges publiques. Nous avons pour mission, comme vous nous le demandez dans votre lettre, Monsieur le Premier ministre, de présenter des propositions d'ordre général. Cependant, plusieurs des suggestions faites seront, nous l'espérons, prises en considération lorsque ces règles de procédure seront reformulées.

Tout d'abord, nous prévoyons que des règles de procédure visant à minimiser les conflits d'intérêts seront énoncées pour chaque catégorie, à commencer par les ministres, puis les membres soustraits de leur personnel, les sous-ministres et les chefs d'organismes, les personnes nommées par le gouverneur en conseil, puis pour plusieurs classifications de fonctionnaires. Ainsi, il sera plus facile pour chaque titulaire de charge publique de déterminer les règles de procédure qui lui sont applicables, de même qu'il sera plus facile d'élaborer des règles de procédure appropriées à sa catégorie et à sa classification, ce qui est conforme à l'approche fonctionnelle que nous décrivons plus loin dans le présent chapitre.

Ensuite, les règles de procédure devraient, tout comme les lignes directrices actuelles, porter sur les questions suivantes.

1. Les types d'affaires, d'investissements, d'activités professionnelles ou autres jugés incompatibles avec une charge publique d'une certaine catégorie ou d'une certaine classification devraient être énumérés. Ainsi chaque titulaire de charge publique serait informé du type de valeurs ou d'activités qui pourrait vraisemblablement créer un conflit d'intérêts et, par conséquent, dont le titulaire devrait se dessaisir ou qu'il devrait cesser (suivant le cas) par mesure de prévention.

2. Les valeurs et les activités soustraites à l'application de cette mesure de prévention devraient être décrites. Les lignes directrices actuelles, par exemple, énumèrent bon nombre de biens exemptés et décrivent des circonstances dans lesquelles les titulaires de charges publiques peuvent conserver un poste d'administrateur ouune charge dans des organismes et des sociétés privées à caractère philanthropique ou éducatif. Ce sont des biens et des activités qui ne sont pas susceptibles de

créer de conflits d'intérêts et qui, par conséquent, n'ont pas besoin d'être visées par les procédures préventives de dessaisissement ou de cessation.

3. Il faudrait prévoir diverses méthodes de dessaisissement (telles que la vente de biens ou l'utilisation d'une fiducie et expliquer laquelle convient le mieux à la situation particulière d'un titulaire de charge publique. Plus particulièrement, il faudrait décrire les types de fiducie (les fiducies en compte bloqué, les fiducies sans droit de regard, les sociétés de portefeuille en fiducie ou autres) qui sont autorisés dans divers cas, y compris la durée des fiducies, le choix des fiduciaires et le dépôt d'actes de fiducie.

4. Il faudrait envisager d'appliquer une règle de minimis dans les cas appropriés où un titulaire de charge publique doit se dessaisir de biens, afin qu'il ne soit pas tenu de suivre une procédure poussée et parfois coûteuse pour éviter ce que les gens sensés considéreraient comme un conflit d'intérêts potentiel ou apparent tout à fait minime.

5. On pourrait utiliser davantage la méthode de déclaration publique pour composer avec les situations de conflits d'intérêts. Nous recommandons qu'on y ait recours dans tous les cas possibles.

6. Comme il est impossible que le règlement traite de tous les cas équitablement et raisonnablement, il conviendrait de conférer un certain pouvoir discrétionnaire quant à l'exécution des règles de procédure. Il faudrait préciser la procédure à suivre pour demander d'être soustrait à l'application d'une règle dans un cas particulier.

7. Il importe de garantir la confidentialité de l'information que le titulaire de charge publique divulgue en privé au sujet de ses biens à un supérieur ou au Conseiller en éthique.

8. Il importe de préciser les procédures à suivre et les délais à respecter pour les cas où des fonctionnaires sont tenus de divulguer à leurs supérieurs les offres d'emploi reçues.

9. Il importe de préciser la procédure à suivre pour obtenir avis et conseils ou en donner à des personnes, à des ministères ou à des organismes centraux.

f) Approche fonctionnelle pour l'application des règles régissant les conflits d'intérêts

Pour ce qui est de l'application des "Règles de procédure visant à minimiser les conflits d'intérêts", nous recommandons une approche fonctionnelle suivant laquelle, bien que tous les titulaires de charges publiques, sans égard à leur catégorie et y compris les ministres, devraient être assujettis au même code d'éthique, toutes les procédures à suivre pour minimiser les conflits d'intérêts, telles que la vente de placements, la divulgation ou l'établissement de fiducies, devraient dépendre de la nature des fonctions et des responsabilités des employés de l'État par rapport à leur catégorie et à leur classification.

Ainsi, tous les ministres seraient tenus de se conformer aux règles de procédure les plus complètes visant à minimiser les conflits d'intérêts, puisque, quelles que soient leurs responsabilités ministérielles individuelles, ils sont membres du Cabinet et, par conséquent, ils participent aux prises de décisions et partagent des renseignements confidentiels en tant que membres de la plus haute direction du pays.

L'application de l'approche fonctionnelle pourrait donner l'impression que des distinctions pourraient être faites entre les sous-ministres mais, compte tenu du processus décisionnel actuel au sein du gouvernement fédéral - les discussions interministérielles, qui sont de pratique courante, le système des enveloppes budgétaires, etc. - nous recommandons que les règles de procédure visant à minimiser les conflits d'intérêts et applicables aux ministres soient étendues aux sous-ministres.

Il peut s'avérer nécessaire d'assujettir certains autres titulaires de charges publiques aux règles générales applicables aux ministres et aux sous-ministres en raison de la nature de leurs fonctions et responsabilités. Il faut toutefois avoir soin de ne pas établir des procédures qui ne recherchent que la simplicité administrative. Nous soulignons encore une fois que les procédures doivent avant tout être équitables, simples et raisonnables.

Pour les postes de niveaux inférieurs à ceux des ministres et des sous-ministres, les règles visant à minimiser les conflits d'intérêts devraient être établies suivant les fonctions et les responsabilités des titulaires de charges publiques. Par exemple, plus les fonctions et les responsabilités sont générales, plus les exigences de dessaisissement doivent être générales. De même, plus les fonctions et les responsabilités sont spécialisées, plus la portée des dispositions relatives au dessaisissement doit être limitée.

Cette approche fonctionnelle est conforme à notre position (exposée au chapitre 16) suivant laquelle les membres des

organismes quasi judiciaires devraient être assujettis à des restrictions clairement énoncées dans les statuts administratifs applicables particulièrement à l'industrie ou à l'activité qu'ils réglementent. Ainsi, comme la Loi sur l'Office national de l'énergie l'exige maintenant, il est interdit aux membres de l'Office de détenir des titres de sociétés énergétiques.

Cette approche est également conforme à nos vues sur les sociétés de la Couronne et leur personnel de haute direction nommé par le gouverneur en conseil. Chaque société de la Couronne exerce ses activités dans un secteur différent et chacune est susceptible de faire face à des situations de conflits d'intérêts particulières ou générales. Tous les cadres supérieurs et les employés devraient être assujettis au code d'éthique, et toutes les sociétés de la Couronne devraient, à tout le moins, répondre aux normes générales du secteur privé. Toutefois, parce qu'elles relèvent du secteur public, elles devraient en plus être tenues d'élaborer des règles précises sur les conflits d'intérêts, à l'intention de leurs cadres supérieurs et de leurs employés, et de les soumettre à l'approbation du gouvernement.

L'approche fonctionnelle s'applique déjà en principe aux postes inférieurs à ceux de sous-ministres au sein des ministères, c'est-à-dire que pour déterminer si un employé doit avoir recours au dessaisissement ou se retirer d'un dossier pour éviter tout conflit d'intérêts on tient compte de ses intérêts privés par rapport aux fonctions qu'il est tenu d'accomplir. Il incombe à l'employé de faire connaître au sous-ministre ses intérêts personnels qui pourraient entrer en conflit avec ses fonctions publiques, et c'est le sous-ministre qui décide de la meilleure façon de minimiser ou d'éliminer le risque de conflit.

En ce qui concerne les membres du personnel soustrait des ministres, dont certains ont accès aux documents du Cabinet et participent à l'établissement des politiques gouvernementales, plus ils sont informés et mis à contribution, plus il est nécessaire d'établir pour eux des règles de dessaisissement d'une grande portée. Par contre, nous ne voyons guère l'utilité d'imposer des exigences de dessaisissement au personnel des bureaux de circonscriptions des ministres.

L'approche fonctionnelle pourrait s'appliquer également aux secrétaires parlementaires, bien que nous sachions, en tant qu'anciens ministres du Cabinet, que les responsabilités attribuées aux secrétaires parlementaires dépendent en grande partie des pratiques de chaque ministre.

Les ambassadeurs, les hauts-commissaires et les consuls généraux, bien que nommés par le gouverneur en conseil, devraient être considérés, lorsqu'il est question de conflits d'intérêts, comme des cadres du ministère des Affaires extérieures.

g) Raison d'être des codes complémentaires

Nous avons vu plus tôt comment, en 1973, le Conseil du Trésor a invité les ministères et organismes, lorsqu'ils le jugeaient approprié, à élaborer des codes d'éthique complémentaires pour renforcer les lignes directrices générales applicables à tous les employés du secteur public. Dans le cadre de notre étude d'une reformulation des règles régissant l'éthique, nous devons maintenant aborder la question des codes complémentaires.

L'utilité des codes complémentaires découle du fait que l'activité gouvernementale compte plusieurs facettes et que des règles d'application générale ne peuvent être énoncées qu'en des termes très généraux. Il est nécessaire d'établir des règles spéciales pour faire face aux problèmes uniques que connaissent par exemple Air Canada et les ministères de l'Agriculture et des Communications. Les codes complémentaires constituent un mécanisme efficace, car des règles détaillées applicables aux employés qui inspectent les avions, qui analysent les récoltes ou qui s'occupent des investissements à court terme du gouvernement ne visent de toute évidence qu'un petit groupe de personnes au sein de tout l'appareil gouvernemental. De plus, il n'est guère utile de rassembler toutes ces dispositions détaillées dans un seul guide destiné à tous les employés du gouvernement.

Dans un article publié récemment, H.L. Laframboise signale le danger inhérent de la prolifération des contrôles au niveau des services et la trop grande importance attachée à l'observation des règles et politiques édictées par les organismes centraux, qui, fait-il valoir, "ont porté très sérieusement atteinte au libre jeu de la conscience et de la discrétion dans le système de valeurs de la fonction publique fédérale. En conséquence, le comportement des gestionnaires est trop conditionné par l'imputabilité vis-à-vis d'autrui, ce que l'on appelle "l'imputabilité dépendante", et ne l'est pas assez par le contrôle de la conscience individuelle ...[1]"

Certains ministères ont élaboré des codes bien avant qu'ils ne soient invités à le faire en 1973, mais c'est principalement depuis cette année-là que cette pratique s'est généralisée. L'annexe B énumère tous les codes complémentaires en vigueur qui ont pu être vérifiés, soit environ 112, y compris ceux de ministères, d'organismes et de sociétés de la Couronne. Ils sont joints au présent rapport et ils peuvent être également consultés chez le sous-registraire général adjoint.

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1 H.L. Laframboise, Conscience and Conformity: the Uncomfortable Bedfellows of Accountability, Administration publique du Canada, automne 1983, vol. 26, n° 3, p. 325.

Nous tenons à faire trois observations générales sur la nature des codes complémentaires existants.

1. Certains codes complémentaires sont très brefs et ne font guère plus qu'adapter ou résumer la teneur des statuts pertinents qui portent sur des questions comme la corruption, les cadeaux personnels, les activités politiques, etc. Ces codes ne sont en fait qu'une reformulation d'autres règles établies.

2. D'autres codes sont le résultat d'efforts considérables déployés pour établir des règles supplémentaires appropriées au ministère ou à l'organisme et pour les regrouper dans un guide général destiné à orienter la conduite des employés.

3. Comme on peut s'y attendre, étant donné le grand nombre d'auteurs concernés, ces codes sont rédigés dans des styles différents, se distinguant souvent dans leurs façons d'aborder le sujet. Certains sont présentés sous la forme d'impératifs, d'autres sous la forme de recommandations. Certains sont présentés comme une série de commandements dans le style "faites ceci et ne faites pas cela", tandis que d'autres soulignent l'importance d'exécuter une charge publique d'une manière positive et professionnelle. On note une grande diversité de termes, de définitions et d'expressions d'un code à l'autre.

Nous examinons dans les paragraphes subséquents les lignes directrices complémentaires du ministère des Affaires extérieures, du ministère de l'Emploi et de l'Immigration, du Bureau du vérificateur général, de la Société Radio-Canada et de la Banque du Canada. Bien que les cinq codes semblent avoir pour objet d'éliminer tout conflit réel et apparent, ils comportent de grandes différences. Ils ont deux facteurs en commun: ils comprennent tous des lignes directrices supplémentaires assorties de certaines dispositions applicables à leur organisme ou ministère et ils décrivent tous la procédure à suivre pour déclarer un conflit réel ou potentiel. Les codes des ministères des Affaires extérieures et de l'Emploi et de l'Immigration sont semblables en ce sens qu'ils reproduisent les lignes directrices et expliquent leur fondement légal, qu'ils comportent des notes explicatives, des exemples de conflits, des observations sur les cadeaux, les vêtements et les activités politiques, et qu'ils expliquent l'application de ces codes aux employés en poste à l'étranger.

Le code des Affaires extérieures est le seul qui met en garde contre les conflits concernant les conjoints et les personnes à charge. Les documents de la Société Radio-Canada et de la Banque du Canada portent avant tout sur des questions qui

constituent précisément des conflits d'intérêts. Bien qu'aucun d'entre eux n'inclue les lignes directrices de 1973 qui sont à leur origine, les deux documents sont fondamentalement des versions paraphrasées. Ces deux ensembles de lignes directrices mettent l'accent sur le fonctionnement de l'organisation; ils ne portent pas sur la conduite des employés en dehors des situations de conflits d'intérêts.

Le document en deux parties du Bureau du vérificateur général se distingue des autres. Il traite en premier lieu du professionnalisme et de l'intégrité des employés, de l'objectivité attendue des vérificateurs et de la recherche de l'excellence au sein du gouvernement, et il aborde l'éthique applicable particulièrement aux fonctions du vérificateur. En second lieu, il décrit les façons de reconnaître et d'éviter les conflits d'intérêts, indiquant que les employés sont assujettis aux lignes directrices de 1973 et expliquant bien clairement leur application. Il s'agit du seul code parmi les cinq qui fait mention des restrictions applicables aux activités après-mandat des titulaires de charges publiques.

Le code du ministère de l'Emploi et de l'Immigration décrit les formes d'invitations sociales interdites et les exceptions raisonnables, tandis que celui des Affaires extérieures met l'accent sur l'objectivité dont doivent faire preuve les employés lorsqu'ils formulent des recommandations ou qu'ils fournissent des avis et conseils sur le type et le montant des subventions et des contributions qui proviennent des fonds publics et peuvent être versés à des organismes nationaux, internationaux et autres ou à des particuliers. Le document du Bureau du vérificateur général déclare que les membres du personnel qui sont des fonctionnaires travaillent avant tout pour le Bureau du vérificateur général du Canada et que ce principe a primauté sur tous autres rapports professionnels. Est considéré comme un conflit d'intérêts et donc comme une situation illégale tout emploi secondaire lié aux activités gouvernementales et exercé directement ou pour le compte d'un tiers.

L'usage des biens du gouvernement est un exemple du genre de questions qui pourraient être traitées plus en détail dans un code complémentaire. Selon le sixième principe du projet de code d'éthique, "il est interdit aux titulaires de charges publiques d'utiliser directement ou indirectement les biens du gouvernement, quels qu'ils soient, y compris les biens loués au gouvernement, ou d'en permettre l'usage, à des fins autres que des activités officiellement approuvées". Afin que les titulaires de charges publiques puissent comprendre ce principe et s'y conformer, il peut être utile d'énoncer clairement des règles particulières à cet égard pour les cas où le principe général ne suffirait pas. Par exemple, il arrive que les laboratoires et installations d'essai du gouvernement servent à des personnes employées par le gouvernement pour faire des recherches scienti-

fiques ou rédiger des rapports qui seront produits à titre de témoignages d'experts dans des procédures civiles, et pour lesquels ces personnes sont rémunérées par des sources privées. Il se peut que, privées de ces installations de recherche, ces personnes ne puissent disposer des données adéquates à présenter au tribunal sur la question au sujet de laquelle elles doivent rendre témoignage. Les problèmes de ce genre se posent bel et bien dans le secteur public; c'est pourquoi l'existence de règles détaillées dans les codes complémentaires peut être utile à toutes les parties concernées.

Jusqu'à présent, le gouvernement n'a pas émis de directives particulières à l'égard de l'utilisation des biens, des fournitures et du matériel du gouvernement à des fins autres que des activités officielles, mais plusieurs ministères ont formulé des règles internes et quelques-uns les ont incluses dans leur code d'éthique complémentaire. Nous donnons ci-après trois exemples de codes complémentaires existants, chacun étant fondé sur le principe fondamental que l'utilisation des biens du gouvernement sans autorisation préalable est interdite.

Les règles de la Commission des droits de la personne relatives à l'usage des biens de la Commission prévoit: (1) que l'utilisation des locaux, des fournitures et du matériel de la Commission pour la conduite d'une entreprise commerciale à des fins personnelles est interdite; et (2) que l'utilisation par un employé, sans autorisation préalable, des locaux, des fournitures et du matériel de la Commission à des fins personnelles est illégale.

Les règles de Revenu Canada (Impôt) relatives à l'utilisation des biens du gouvernement prescrit qu'il est interdit d'utiliser les biens du gouvernement du Canada ou les services d'un autre employé durant les heures de travail à des fins autres que les activités officiellement approuvées. Tous les biens du gouvernement confiés ou prêtés à un employé doivent être protégés et conservés d'une manière raisonnable; ils doivent être rendus à la demande des fonctionnaires autorisés.

Les règles de la Gendarmerie royale du Canada relatives à l'utilisation des biens de la Gendarmerie prévoit: (1) que l'utilisation des locaux, des fournitures ou du matériel de la GRC pour la conduite d'activités commerciales à des fins personnelles est interdite; et (2) que l'utilisation des locaux, des fournitures ou du matériel de la GRC à des fins personnelles est interdite, à moins que ne l'autorise le chef/le directeur/la direction autonome.

Étant donné l'importance des codes complémentaires et compte tenu de notre souci d'établir des règles d'éthique simples, justes et raisonnables, nous recommandons que les codes existants relèvent à juste titre du Bureau de l'éthique dans le secteur

public. Il est prévu que, une fois que les règles complémentaires existantes auront été reformulées, le Conseiller en éthique en présentera un projet au sous-ministre ou chef de l'organisme concerné, auquel moment ce dernier pourra confirmer que la reformulation est satisfaisante pour les besoins du ministère ou de l'organisme, sinon le sous-ministre ou chef de l'organisme et le Conseiller en éthique pourront décider du libellé approprié.

En conséquence de cette approche, tous les ministères, conseils, commissions et organismes qui ont des codes complémentaires constateront qu'ils sont soumis à la même terminologie et aux mêmes procédures, ce qui facilitera les efforts en vue d'informer les fonctionnaires sur les procédures à suivre, simplifiera les procédures et facilitera la tâche des fonctionnaires qui seront mutés dans un autre ministère. De plus, les sous-ministres, qui sont les principaux responsables de l'application du code d'éthique au sein de leur ministère, sauront reconnaître l'utilité d'un ensemble de termes et de procédures communs pour l'ensemble du gouvernement, lorsqu'ils auront à changer de ministère.

Il faut bien comprendre que nous n'envisageons pas que le Conseiller en éthique rédige les règles détaillées pour les ministères, c'est-à-dire qu'il décide de ce qui est bien ou mal sous la forme de règles d'éthique. Au contraire, le Conseiller en éthique sera chargé d'aider simplement les ministères et les organismes à reformuler, suivant une présentation commune, les règles qu'ils ont déjà élaborées.

C'est le sous-ministre ou chef d'organisme qui demeurera le principal responsable du libellé des règles et de leur application.

CHAPITRE 13

ÉTABLISSEMENT D'UN BUREAU DE L'ÉTHIQUE DANS LE SECTEUR PUBLIC

a) Introduction

L'établissement d'un Bureau de l'éthique dans le secteur public constitue la clef de voûte de [illegible]e proposition.

Nous examinerons d'abord le rôle du sous-registraire général adjoint (SRGA), du Conseil du Trésor et de la Commission de la Fonction publique afin de voir comment le Bureau de l'éthique dans le secteur public que nous proposons peut prendre forme à partir des dispositions actuelles. Puis nous analyserons la structure du Bureau, son rôle et ses rapports, ainsi que le rôle de la personne qui serait chargée de sa direction, soit le Conseiller en éthique.

b) Rôle actuel du sous-registraire général adjoint (SRGA)

Le Bureau du SRGA a été constitué en mai 1974. Le SRGA est chargé de l'administration de la politique du gouvernement fédéral sur les conflits d'intérêts au moyen de l'application des diverses lignes directrices sur les conflits d'intérêts touchant les ministres de la Couronne, leur personnel soustrait et les personnes nommées par le gouverneur en conseil.

Ce Bureau est situé au ministère de la Consommation et des Corporations. Le 9 mai 1974, le Conseil du Trésor approuvait les ressources nécessaires pour le Bureau du SRGA, soit un effectif de 12 pour l'administration de l'activité des conflits d'intérêts pour les groupes mentionnés au paragraphe précédent. (Le SRGA est également chargé de l'enregistrement et de la délivrance des documents exigés du Registraire général du Canada par divers lois et règlements, en particulier le Règlement sur les documents officiels, ainsi que du bon usage et de la garde du Grand sceau du Canada, du sceau de l'administrateur, du sceau privé et du sceau du Registraire général du Canada.)

Le 17 mai 1974, David R. Taylor devenait le premier SRGA. Le directeur du groupe consultatif sur les normes de conduite, G.J. Robert Boyle, est entré au Bureau le 3 juin 1974.

Dès son entrés en fonction, le SRGA s'est chargé entièrement de parachever les dispositions que les ministres du Cabinet prenaient pour se conformer à la directive du 28 décembre 1973 du Premier Ministre à l'égard des décisions du Cabinet portant sur l'application du régime ministériel sur les conflits

d'intérêts. Les dossiers personnels et confidentiels de chaque ministre, qui se trouvaient auparavant au Bureau du Conseil privé, ont été transférés au SRGA. Les premières priorités, prendre les dispositions nécessaires pour les ministres, rédiger un projet de lignes directrices pour les personnes nommées par le gouverneur en conseil et établir les mécanismes de fonctionnement du Bureau du SRGA, ont été réalisées avant décembre 1974.

Le Bureau du SRGA a donc les fonctions principales suivantes:

- administrer les lignes directrices sur les conflits d'intérêts touchant les lieutenants-gouverneurs, les ministres, les membres désignés de leur personnel soustrait, les personnes nommées par le gouverneur en conseil oeuvrant à temps plein et les autres personnes à qui s'appliquent des lignes directrices semblables;

- conseiller ces personnes et les aider à régler leurs affaires personnelles de façon à observer les lignes directrices afin d'éviter tout conflit réel ou apparent entre les intérêts privés et les intérêts du public;

- fournir au Premier ministre et aux ministres les renseignements dont ils ont besoin pour prendre des décisions concernant les conflits d'intérêts;

- assurer la bonne administration des fiducies en compte bloqué dont le SRGA est fiduciaire et fournir des renseignements financiers essentiels à l'égard de ces comptes à ceux qui les ont établis;

- approuver les instruments de fiducie préparés par les titulaires de charges publiques pour se conformer aux lignes directrices sur les conflits d'intérêts lorsque ces personnes demandent le remboursement des frais de fiducie conformément à la politique gouvernementale et approuver le remboursement par le ministère ou organisme en cause;

- tenir un Registre public des déclarations sur les conflits d'intérêts et des déclarations publiques des personnes assujetties à ces exigences;

- veiller à ce que soient respectées la politique et les lignes directrices en matière de conflits d'intérêts qui concernent les lieutenants-gouverneurs, les ministres, le personnel soustrait des ministres et les personnes nommées par le gouverneur en conseil, et à ce qu'aucune infraction ne se produise, par inadvertance ou autrement; et

- au besoin, conseiller les ministères et organismes et les aider à rédiger les lignes directrices spéciales ou complémentaires que peut exiger leur situation particulière, et s'assurer que ces lignes directrices sont conformes à la politique gouvernementale en matière de conflits d'intérêts.

À ces fonctions principales du sous-registraire général adjoint s'ajoutent notamment les activités suivantes:

- mettre en oeuvre, appliquer et administrer les politiques et les lignes directrices du gouvernement au nom du Premier ministre et grâce à de vastes pouvoirs délégués par l'entremise du Greffier du Conseil privé;

- approuver les dispositions prises par les personnes nommées par le gouverneur en conseil et le personnel soustrait des ministres à qui s'appliquent les lignes directrices relatives aux conflits d'intérêts, et en informer le ministre responsable;

- demander l'approbation du Premier ministre après s'être assuré que les dispositions prises par les ministres à l'égard des conflits d'intérêts sont appropriées;

- résoudre les cas difficiles, délicats ou nouveaux qui se présentent lors de la mise en oeuvre des politiques ou de l'application des lignes directrices en matière de conflits d'intérêts;

- prendre des dispositions pour qu'un vérificateur indépendant examine les fiducies en compte bloqué administrés par le SRGA et fasse rapport de ses conclusions au Premier ministre et au Contrôleur général; et

- tenir le Premier ministre et le Greffier du Conseil privé au courant quant à l'observation des lignes directrices qu'il administre, ainsi que d'autres affaires touchant les conflits d'intérêts.

En novembre 1974, le Cabinet approuvait les lignes directrices touchant les personnes nommées par le gouverneur en conseil. Au départ ces lignes directrices s'appliquaient aux cadres supérieurs et, par la suite, on a demandé à d'autres titulaires comme les ambassadeurs, les hauts-commissaires, les consuls généraux et les officiers supérieurs de la GRC de s'y conformer. Le 2 juin 1975, le Premier ministre demandait au SRGA de rédiger des lignes directrices touchant les membres du

personnel soustrait des ministres et de les administrer en son nom. Ces lignes directrices, qui s'apparentent à celles qui régissent les ministres, ont été approuvées le 20 novembre 1975 et l'on a demandé aux membres du personnel désigné par les ministres de s'y conformer.

Au cours de la dernière décennie, le SRGA a participé à l'élaboration de la plupart des politiques et des lignes directrices affectant les titulaires de charges publiques, notamment les lignes directrices touchant les ministres de la Couronne publiées par le Premier ministre Clark le 1er août 1979 et par le Premier ministre Trudeau le 28 avril 1980.

En février 1982, à la suite d'une décision du Cabinet, le Conseil du Trésor publiait la nouvelle politique gouvernementale sur le remboursement de certains frais de fiducie, chargeant le SRGA d'approuver les fiducies en cause et les coûts raisonnables réclamés.

Le Bureau du SRGA comprend présentement le sous-registraire général adjoint, le directeur du groupe consultatif sur les normes de conduite, trois conseillers principaux, un conseiller, trois secrétaires, un commis et un agent d'administration et de fiducie.

En général, des dispositions visant une cinquantaine de titulaires sont normalement en négociation; ce chiffre atteint près de 200 lors de remaniement ministériel important et dépasse 300 lorsqu'il y a changement de gouvernement.

Le SRGA relève du Premier ministre et du Greffier du Conseil privé pour les questions relatives aux conflits d'intérêts, et du sous-ministre de la Consommation et des Corporations pour ce qui est de l'administration du bureau chargé des conflits d'intérêts et des questions relatives aux fonctions du Registraire général du Canada, qui est le ministre de la Consommation et des Corporations.

c) Rôle actuel du Conseil du Trésor

À l'exception de l'administration des fiducies, confiée au SRGA, c'est au Conseil du Trésor qu'incombe l'administration des lignes directrices sur les conflits d'intérêts touchant les fonctionnaires. Ce pouvoir découle de la Loi sur l'administration financière qui stipule que le Conseil du Trésor peut agir au nom du Conseil privé de la Reine pour toutes les questions relatives à la gestion du personnel dans la fonction publique, notamment la détermination des conditions d'emploi des fonctionnaires. La loi dispose en outre que le Conseil du Trésor peut établir des normes de discipline et des sanctions financières ou autres, y compris la suspension et la révocation en cas d'infraction à la discipline ou d'inconduite, et que ces pouvoirs peuvent être délégués aux sous-

chefs. Bien que les lignes directrices sur les conflits d'intérêts touchant les fonctionnaires aient été adoptées par décret du Conseil, elles sont administrées, pour toute la fonction publique, par le Conseil du Trésor (sauf que le SRGA a le pouvoir d'administrer les dispositions de la politique sur les conflits d'intérêts pour les fonctionnaires touchant les fiducies). Leur application sur le plan opérationnel a été déléguée aux sous-chefs. L'usage actuel veut que les ministères et organismes traitent de tous les problèmes de conflits de façon interne et que, s'ils ne savent quelle position adopter, ils demandent l'interprétation et les conseils du Conseil du Trésor. Celui-ci donne alors son interprétation et ses conseils, mais en général on encourage les ministères à prendre les décisions finales.

Comme les sous-chefs détiennent (par délégation) le pouvoir de régler les cas de conflits d'inérêts, ils ne sont pas liés par les conseils qu'ils reçoivent du Conseil du Trésor. D'autre part, ils peuvent être obligés de rendre compte de leurs actes et de leurs décisions.

Les activités dont s'occupe le Conseil du Trésor dans ce domaine sont les suivantes:

- renseigner les ministères sur la façon de traiter les cas particuliers de conflits d'intérêts qui se présentent, et ceux d'activités politiques qui ne sont pas visés spécifiquement par l'article 32 de la Loi sur l'emploi dans la Fonction publique;

- interpréter les lignes directrices sur les conflits d'intérêts et les emplois ultérieurs;

- aider les ministères à élaborer des codes complémentaires;

- élaborer et établir une politique à l'échelle de la fonction publique sur les questions de conduite en général, y compris les conflits d'intérêts, l'expression publique, le harcèlement personnel et le service au public.

d) Rôle actuel de la Commission de la Fonction publique

La Commission de la Fonction publique est présentement chargée des aspects de l'activité politique qui sont régis par l'article 32 de la Loi sur l'emploi dans la Fonction publique, notamment de l'activité politique partisane des fonctionnaires fédéraux, aux paliers fédéral et provincial. L'article formule expressément certains types d'activités interdites et indique les activités permises. À l'égard de l'activité politique, la Commission de la Fonction publique:

- conseille les ministères quant à l'interprétation et à l'application de l'article 32, et aux cas d'activité politique non visés par ledit article;

- publie au besoin des bulletins supplémentaires;

- examine les demandes de particuliers qui désirent se porter candidats à une élection ou tenter d'être nommés candidats et approuve ou rejette les congés; et

- mène des enquêtes en réponse aux allégations d'infraction à l'article 32.

Le Comité consultatif sur les emplois ultérieurs des fonctionnaires, créé par l'Annexe IV des lignes directrices sur les emplois ultérieurs, est présentement présidé par un commissaire de la Commission de la Fonction publique.

e) Attribution de la fonction du SRGA à une nouvelle entité dotée d'un mandat plus clair, de pouvoirs élargis et d'une plus grande visibilité

Il est manifeste que le rôle actuel du sous-registraire général adjoint a évolué au cours de la dernière décennie au rythme de l'élaboration des lignes directrices. Nous croyons qu'une reformulation des lignes directrices s'impose maintenant et qu'il faudrait en même temps restructurer la fonction dont s'acquittait jusqu'à maintenant le sous-registraire général adjoint.

Comme nous favorisons, en principe, la continuation de ces responsabilités, bien bien que sous une forme quelque peu modifiée et sur une base fonctionnelle, il faudra toujours un titulaire ou un organisme quelconque pour s'acquitter des fonctions dont s'acquitte présentement - et, à notre avis, fort bien - le SRGA.

Nous recommandons de confier cette fonction à une nouvelle entité, un organisme ou un bureau, qui aurait un mandat plus net, des pouvoirs élargis et une plus grande visibilité. Cette nouvelle entité, le Bureau de l'éthique dans le secteur public, cumulerait les fonctions du SRGA ainsi que certaines fonctions en matière d'éthique qu'assument actuellement le Conseil du Trésor et la Commission de la Fonction publique; elle aurait des responsabilités un peu plus grandes que le SRGA et un pouvoir discrétionnaire, que celui-ci ne possède pas.

Nous recommandons d'appeler cette entité "Bureau de l'éthique dans le secteur public" pour bien montrer qu'il s'agit de questions d'éthique et en particulier de questions relatives aux conflits d'intérêts dans l'ensemble du secteur public, y

compris les sociétés de la Couronne qui, sans faire partie de la fonction publique, appartiennent néanmoins clairement au secteur public plutôt qu'au secteur privé.

Un mandat plus clair. Comme on a pu le constater, les fonctions et responsabilités du Bureau du sous-registraire général adjoint sont tout à fait uniques dans l'ensemble du gouvernement. Nous croyons que cela a pour effet d'obscurcir son mandat à l'égard des conflits d'intérêts - sinon dans les échelons supérieurs du gouvernement, à tout le moins dans le grand public.

Des pouvoirs élargis. Pour qu'un Bureau de l'éthique dans le secteur public puisse servir effectivement de point central pour l'ensemble de l'effort du gouvernement fédéral en matière de conflits d'intérêts, il faut que le Conseiller en éthique ait des pouvoirs et une autorité appropriés à la tâche. L'élargissement des pouvoirs qui devraient être confiés au Conseiller en éthique se fera de deux façons. Les pouvoirs dont jouit déjà le sous-registraire général adjoint, les pouvoirs du Conseil du Trésor et ceux de la Commission de la Fonction publique à l'égard des questions d'éthique dans la fonction publique seront regroupés. Certains de ces pouvoirs seront consolidés dans le Bureau de l'éthique dans le secteur public. En second lieu, la Loi sur l'éthique dans le secteur public conférera au Conseiller en éthique de nouveaux pouvoirs, y compris celui de procéder à des enquêtes sur demande ainsi que celui d'éducateur à l'égard de l'éthique dans le secteur public.

Une plus grande visibilité. Il est également manifeste qu'en élaborant des lignes directrices sur les conflits d'intérêts et en les faisant administrer par le Conseil du Trésor pour l'ensemble de la fonction publique, et par le sous-registraire général adjoint pour toutes les autres personnes qui y sont soumises, le gouvernement voulait régler la question d'une façon efficace, mais sans éclat. On avait en somme choisi une démarche peu visible.

Notre enquête a clairement révélé que cette démarche n'a pas réussi: beaucoup de gens ne connaissent pas le rôle du Conseil du Trésor ou du SRGA dans ce domaine et ne sont pas suffisamment au courant des règles régissant l'éthique. Si ce manque de connaissances est si fréquent au sein du gouvernement, il l'est manifestement encore plus dans le grand public. Nous recommandons que le Conseiller en éthique ait une grande visibilité publique, qui découlera en grande partie de son rôle de sensibilisation en matière d'éthique. Son impartialité, réelle et apparente, et le fait qu'il soit libre de préjugés politiques ou bureaucratiques lui donneront d'autres atouts importants. En créant ce poste, le gouvernement montrera qu'il est prêt à exposer ses problèmes au grand jour et accroîtra ainsi la crédibilité et l'objectivité des enquêtes sur la conduite des titulaires de charges publiques. En regroupant toutes les questions de conflits d'intérêts et les

questions connexes, après que toutes les tentatives de solution se soient avérées vaines, le Bureau de l'éthique dans le secteur public jouera un rôle nécessaire en établissant la jurisprudence dans ce domaine.

f) Conseiller en éthique

Nous recommandons que le chef du Bureau de l'éthique dans le secteur public s'appelle "Conseiller en éthique" et que le titulaire soit une personne d'expérience, reconnue pour son intégrité et dont le prestige pourrait assurer dignité et autorité à ce poste, quelqu'un en qui le gouvernement, la fonction publique, les partis d'opposition, les médias et le grand public pourraient avoir la plus grande confiance. Sans suggérer que cette personne ait une formation juridique, nous proposons qu'elle ait le rang de juge d'une cour supérieure.

g) Taille du Bureau

Comme nous l'avons mentionné au chapitre 1, l'adoption de nos recommandations n'entraînerait probablement pas d'augmentation appréciable de la bureaucratie ni des coûts d'administration dans l'ensemble du gouvernement. Le Bureau de l'éthique dans le secteur public aurait à peu près la même taille que l'actuel Bureau du sous-registraire général adjoint, dont l'effectif est de 12 personnes. Toute augmentation des ressources nécessaires au Conseiller en éthique pour remplir ses nouveaux mandats sera compensée d'emblée par des économies dans les ministères et organismes eux-mêmes.

h) Structure et organisation du Bureau de l'éthique dans le secteur public

Pour bénéficier de la plus grande indépendance possible, le Conseiller en éthique devrait être nommé par décret du Conseil. Le personnel requis par le Bureau de l'éthique dans le secteur public devrait être recruté conformément à la Loi sur l'emploi dans la fonction publique.

i) Fonctions du Bureau de l'éthique dans le secteur public

Le Bureau de l'éthique dans le secteur public, dirigé par un Conseiller en éthique, aurait quatre fonctions:

1. fonction consultative
2. fonction administrative, comprenant l'autorisation de lever ou de modifier une règle
3. fonction d'enquête
4. fonction de sensibilisation

1. Fonction consultative. Le Bureau serait chargé de fournir des conseils à l'égard de l'application des règles d'éthique dans le secteur public.

Comme nous l'envisageons, ce rôle s'exercerait sur trois fronts: le Conseiller en éthique servirait de conseiller au Premier ministre, aux ministres et aux sous-chefs des ministères et organismes à l'égard des règles et des procédures applicables à la fois à ceux qui relèvent d'eux et, le cas échéant, aux personnes qui sont nommées par eux. En premier lieu, le Conseiller en éthique conseillerait le Premier ministre à l'égard des ministres, de son propre personnel soustrait, des personnes nommées par le gouverneur en conseil et des secrétaires parlementaires. En second lieu, le Conseiller en éthique conseillerait les ministres à l'égard de leur personnel soustrait, du secrétaire parlementaire qui leur est assigné et des personnes nommées par le gouverneur en conseil qui relèvent d'eux. En troisième lieu, le Conseiller en éthique servirait de conseiller auprès des sous-chefs des ministères et organismes à l'égard des fonctionnaires et des personnes nommées par le gouverneur en conseil qui relèvent d'eux.

Nous proposons que le Bureau de l'éthique dans le secteur public, outre qu'il continuerait à donner le genre de conseils actuellement fournis par le SRGA, soit grandement consulté pour la formulation des procédures visant à minimiser les conflits d'intérêts à tous les niveaux, dont celles des règles complémentaires des ministères et des sociétés et organismes de la Couronne, de façon qu'elles soient simples et équitables dans l'ensemble du secteur public.

Ces conseils pourraient être donnés de façon officieuse, mais le Conseiller en éthique recevrait probablement des demandes écrites des trois sources mentionnées au sujet de l'interprétation de certains principes ou procédures. De toutes les interprétations provenant d'une même source, il se développerait une "jurisprudence" ou une interprétation commune qui s'appliquerait à l'ensemble de la fonction publique fédérale.

Le sous-chef d'un ministère ou d'un organisme pourrait en tout temps consulter le Conseiller en éthique. Cependant, parce que le sous-chef a le pouvoir délégué de s'occuper des questions de conflits d'intérêts et de les résoudre, il ne serait pas obligé d'accepter les conseils du Conseiller en éthique tout comme il n'est pas présentement obligé d'accepter les conseils du Conseil du Trésor sur de telles questions.

L'existence et le rôle du Bureau de l'éthique dans le secteur public n'ajouteraient pas un échelon supplémentaire dans le système actuel. Le nouveau bureau deviendrait une source centrale de connaissance, d'expertise et d'expérience que consulteraient le Premier ministre, les ministres, les sous-ministres et les chefs des organismes gouvernementaux et des sociétés de la Couronne au sujet des questions d'éthique.

2. Fonction administrative. La fonction administrative du bureau serait étroitement reliée à sa fonction consultative. Tout comme le SRGA, le Bureau de l'éthique dans le secteur public administrerait les procédures, c'est-à-dire qu'il s'assurerait qu'elles sont suivies par les personnes à qui elles s'appliquent et qu'il fournirait l'orientation appropriée. Le Conseiller en éthique serait prêt, comme le fait présentement le SRGA, à servir de fiduciaire pour les fiducies en compte bloqué et les sociétés de portefeuille en fiducie.

Une des graves lacunes des lignes directrices actuelles est l'absence d'une règle de minimis, qui ferait prévaloir le bon sens lorsqu'il s'agit de conflits d'intérêts mineurs, et d'un mécanisme qui permettrait aux anciens titulaires de prouver que leurs activités ultérieures n'enfreignent pas l'esprit des règles, même si elles peuvent sembler contraires à la lettre de ces règles. Si nos propositions en ce sens sont acceptées, il faudrait confier au Conseiller en éthique les pouvoirs nécessaires pour y donner suite.

À l'égard des déclarations à faire ou des fiducies à établir et à administrer, ainsi que de l'aide à accorder à ceux qui accèdent à une charge publique et qui veulent se conformer aux règles sur la divulgation et le dessaisissement, le Bureau de l'éthique dans le secteur public continuerait de s'acquitter des fonctions administratives dont est actuellement investi le Bureau du sous-registraire général adjoint.

3. Fonction d'enquête. Dans certains cas, il serait conforme à l'intérêt public que le Conseiller en éthique fasse enquête lorsque l'on allègue qu'il y a eu infraction au code d'éthique ou que l'on n'a pas suivi les procédures visant à minimiser les conflits d'intérêts. Nous recommandons donc de confier au Conseiller en éthique des pouvoirs d'enquête qu'il pourrait exercer à la demande du Premier ministre, d'un ministre ou du chef d'un ministère ou organisme, selon le cas, mais jamais de son propre chef.

Un des problèmes fondamentaux du système actuel est qu'il n'existe pas de mécanisme qui permette de procéder à une enquête en bonne et due forme lorsqu'on allègue un conflit d'intérêts et d'en arriver à une conclusion définitive. C'est là un des facteurs qui contribue au cynisme du public à l'égard de l'éthique gouvernementale. Si une question n'est jamais vidée, le public risque de se sentir lésé dans ces intérêts et les personnes impliquées peuvent estimer ne pas avoir été traitées de façon équitable ou ne pas avoir été blanchies de façon satisfaisante.

Voyons par exemple ce qui se passe lorsqu'on allègue qu'un ministre a manqué à l'éthique ou qu'il est en situation de conflit d'intérêts. Dans certains cas, il peut s'agir d'allléga-

tions lancées dans le feu d'un débat partisan, sans fondement réel. Dans d'autres cas, il peut y avoir des preuves significatives de manquement à l'éthique ou d'infraction. C'est au Premier ministre qu'il appartiendra, comme toujours, de décider quand il doit prendre de telles affaires au sérieux. Lorsqu'il semble y avoir un véritable motif d'inquiétude, le Premier ministre pourrait renvoyer la question au Conseiller en éthique, qui procéderait à un examen approfondi et donnerait à toutes les parties intéressées l'occasion de se faire entendre dans le cadre de son enquête.

Nous ne voulons pas laisser entendre que le rôle de surveillance que jouent présentement les partis de l'opposition au Parlement et les médias devrait être modifié. Tout ce qui est proposé, c'est l'addition d'un nouvel élément; ainsi, lorsqu'une allégation justifie manifestement une enquête (mais pas une enquête criminelle, qui est du ressort de la GRC), les autorités auraient la possibilité de demander au Conseiller en éthique d'examiner la question et de faire un rapport complet.

Un ministre pourrait renvoyer une affaire au Conseiller en éthique pour enquête lorsque son secrétaire parlementaire, une personne nommée par lui ou un membre de son personnel soustrait enfreint, ou semble enfreindre, le code d'éthique ou ne suit pas les procédures destinées à minimiser les conflits d'intérêts. Toutes les considérations et les méthodes exposées ci-dessus à l'égard des enquêtes entreprises par le Premier ministre à l'égard de ses ministres s'appliqueraient. Un ministre pourrait faire de même et demander une enquête sur un membre de son personnel.

Lorsque les enquêtes portent sur un membre de la fonction publique, des considérations quelque peu différentes s'appliquent. En premier lieu, nous recommandons que l'application et l'administration du code d'éthique au sein d'un ministère ou organisme gouvernemental continuent de relever en premier lieu du sous-ministre ou du chef de l'organisme, en vertu de pouvoirs délégués par le Conseil du Trésor. Toutes nos recommandations sur l'éthique peuvent s'insérer dans ce contexte. Comme à l'heure actuelle, la décision d'enquêter sur toute affaire mettant en cause l'éthique d'un employé sera prise dans le ministère ou l'organisme en cause. Si l'affaire est assez grave pour justifier une enquête policière, cela pourrait se faire exactement comme maintenant. La seule différence serait que dans les cas impliquant un manquement à l'éthique plutôt qu'un comportement criminel, si le sous-ministre ou chef d'un organisme désire que l'enquête se fasse par une personne plus détachée du cas, il devrait pouvoir avoir recours au Conseiller en éthique.

Nous avons déjà dit que le Premier ministre, les ministres, les sous-ministres et les chefs d'organismes peuvent faire entreprendre une enquête par le Conseiller en éthique. La question suivante est de savoir si le Conseiller en éthique

devrait avoir le pouvoir d'entreprendre des enquêtes de son propre chef. Il ne semblerait pas approprié que celui-ci fasse enquête de sa propre initiative à l'égard de titulaires élus. Dans le cas des fonctionnaires, le mieux serait sans doute de renvoyer les allégations de conflits d'intérêts au sous-chef en cause qui déciderait de la façon de procéder.

D'autres organismes ont des fonctions d'enquête qu'il vaut la peine de considérer à cet égard. Au ministère de la Défense nationale, lorsqu'un accident ou une autre affaire exige une enquête, on réunit une commission d'enquête spéciale. La Loi sur la défense nationale donne à certains membres du Ministère le pouvoir de constituer une commission et d'en choisir les membres, en fonction des connaissances et des compétences nécessaires; le grade et le degré de désintéressement sont aussi des facteurs de sélection.

Nous constatons également un parallèle intéressant avec le Conseil canadien de la magistrature. En plus de procéder à des enquêtes à la demande du Procureur général du Canada ou d'une province, le Conseil de la magistrature peut, selon la Loi sur les juges, entreprendre ses propres enquêtes en cas d'allégation d'inconduite de la part d'un juge. On pourrait faire valoir que le Conseiller en éthique devrait aussi avoir ce pouvoir.

Cependant, la portée des enquêtes entreprises par le Conseil de la magistrature est relativement restreinte car le groupe qui peut faire l'objet de telles enquêtes est petit. Il n'en va pas de même dans le cas des titulaires de charges publiques, et ce serait donner un pouvoir beaucoup trop vaste au Conseiller en éthique, du moins à l'heure actuelle, que de lui permettre de faire enquête sur toute allégation portée par qui que ce soit à l'égard d'une personne ou d'une affaire dans la fonction publique du Canada. Il se peut que ce pouvoir puisse s'ajouter à ceux qui sont conférés au Conseiller en éthique, après quelques années d'administration du Bureau de l'éthique dans le secteur public.

Nous en venons aussi à cette conclusion en raison de notre mandat, qui exige que nous fassions des recommandations conformes aux traditions de la démocratie parlementaire canadienne. Nous croyons qu'il ne serait pas conforme à la tradition du gouvernement responsable que les personnes directement imputables des actes des ministères du gouvernement soient soumises à des enquêtes "extérieures", quel qu'en soit le motif. Nous n'oublions pas non plus qu'il existe déjà des mécanismes d'application de la loi pour les cas d'infractions aux lois et que ceux-ci continueraient d'être traités à l'avenir comme ils l'ont été dans le passé.

Un facteur peu connu dont il faut tenir compte est que le Conseil canadien de la magistrature, en vertu de l'article 42

de la Loi sur les juges, a le pouvoir d'enquêter sur les allégations portant sur la conduite des personnes nommées à titre amovible en vertu de toute loi du Parlement. Ce mode d'enquête (traité plus en détail au chapitre 16, dans la partie concernant les règles qui régissent les juges et les organismes quasi judiciaires) existe présentement en droit et fait partie des ressources dont dispose le gouvernement pour s'occuper des cas d'infraction.

4. Fonction de sensibilitation. Si nous avons souligné la nécessité de simplifier les règles qui régissent l'éthique, c'est en partie pour les rendre plus faciles à comprendre. Cela nous mène directement à la nécessité d'un programme de sensibilisation ou d'éducation plus efficace pour la fonction publique fédérale quant aux règles et à leur application.

Pour créer un climat favorable dans l'ensemble du secteur public, il faut souligner l'importance de l'éthique. Plus grande est la fonction publique, plus important est ce facteur. Il est donc à propos de sensibiliser de façon générale les officiels et les employés quant à la nature et à l'application des règles d'éthique et aux mécanismes permettant de minimiser les conflits d'intérêts. Souvent, il s'agit de considérations simples et pratiques, comme savoir à qui il faut s'adresser pour discuter une question délicate ou comment clarifier et résoudre une situation compromettante. À cet égard, nous avons été très favorablement impressionnés par certaines des méthodes utilisées par le "Office of Government Ethics" de Washington dans le cadre de son programme permanent de sensibilisation. Ces méthodes comprennent notamment des séminaires, des brochures, des bandes vidéo et une conférence annuelle à l'intention des agents du personnel ou des autres fonctionnaires chargés des questions d'éthique.

(j) Accès au Conseiller en éthique

Pour résumer, les personnes suivantes peuvent s'adresser au Conseiller en éthique:

i) le Premier ministre à l'égard de toute question et en particulier des manquements à l'éthique de la part d'un membre de son personnel soustrait, d'un ministre, d'un secrétaire parlementaire ou d'une personne nommée par le gouverneur en conseil;

ii) les ministres à l'égard de leurs propres affaires et de leur personnel soustrait, de leurs secrétaires parlementaires et des personnes nommées par eux et par le gouverneur en conseil qui relèvent d'eux;

iii) les sous-chefs des ministères et organismes à l'égard de leurs propres affaires et de leur personnel, y compris toute personne nommée par le gouverneur en conseil; et

iv) les présidents-directeurs généraux des sociétés de la Couronne à l'égard de leurs propres affaires et de leur personnel.

Il est prévu que le Conseiller en éthique ait le pouvoir d'enquêter à l'égard de présumés conflits d'intérêts impliquant les ministres, leur personnel soustrait, les secrétaires parlementaires, les personnes nommées par le gouverneur en conseil et les fonctionnaires. Il conviendrait donc, étant donné la nature délicate et complexe du sujet, que toute personne appartenant à l'une de ces catégories puisse soumettre un problème ou une plainte au Conseiller en éthique.

Le Commissaire aux langues officielles accepte les plaintes provenant de particuliers (et il y est obligé par la loi) sans qu'il soit nécessaire de passer par une filière hiérarchique.

La Commission des droits de la personne fonctionne d'une façon semblable, si ce n'est que la loi exige que le plaignant ait épuisé tous les autres mécanismes de recours avant qu'une enquête ne soit entreprise. Même s'il peut sembler souhaitable de suivre la filière hiérarchique, il y a des cas où cela ne serait pas à-propos. Par exemple,

- un particulier peut vouloir informer le Conseiller en éthique d'une situation de conflit qui implique son supérieur, ou

- un particulier pourrait vouloir signaler une situation sous le couvert de l'anonymat.

Le cas particulier des fonctionnaires

En outre, on a soulevé la question de savoir si les fonctionnaires devraient pouvoir recourir au Conseiller en éthique. Nous croyons qu'il ne conviendrait pas que le Conseiller en éthique fasse enquête sur de présumés manquements à l'éthique impliquant des fonctionnaires qui lui auraient été signalés par des fonctionnaires. Il serait tout aussi important que les fonctionnaires aient l'occasion de consulter le Conseiller en éthique quant à savoir si certaines activités sont en fait contraires à l'éthique. La consultation pourrait évidemment porter sur des cas hypothétiques. Cela aiderait à prévenir les manquements à l'éthique de la part de ceux dont les activités pourraient être signalées; il serait également plus difficile de justifier les manquements à l'éthique en disant que: "tout le monde le fait." Néanmoins, nous sommes d'avis qu'il est d'une importance primordiale de maintenir intactes les structures et les procédures présentement élaborées dans les ministères conformément aux principes généraux de l'administration publique canadienne. Lorsque des fonctionnaires en particulier désirent porter des

questions relatives à des manquements à l'éthique à l'attention de leurs supérieurs du ministère, il existe des façons de le faire et une filière à respecter. C'est pourquoi nous recommandons que les fonctionnaires n'aient pas accès direct au Conseiller en éthique.

Lorsqu'une situation de conflit existe vraiment, le sous-chef a le pouvoir délégué de prendre des mesures disciplinaires. Les employés ont droit de recours par le moyen du système de griefs. Si un employé dépose un grief, celui-ci peut être étudié à divers paliers au sein du ministère, le dernier étant le sous-chef. Si l'employé n'est toujours pas convaincu que le grief a été convenablement étudié (et si le grief porte sur une sanction financière, un congédiement ou l'interprétation d'une convention collective) l'affaire peut ensuite aller devant la Commission des relations de travail dans la fonction publique. Finalement, l'affaire pourrait aboutir en cour fédérale et, selon le cas, en cour suprême. Il faut signaler qu'une décision sur un grief prise à n'importe quel palier peut être infirmée au palier suivant. Il serait tout à fait approprié que cette pratique se maintienne, car elle fonctionne bien depuis nombre d'années.

L'effet ultime sur la fonction publique du Bureau de l'éthique dans le secteur public serait que l'on pourrait recourir au besoin à un ensemble supplémentaire de connaissances.

k) Nature des rapports du Conseiller en éthique

Si des députés font pression sur le Premier ministre pour qu'il entreprenne une enquête sur un présumé conflit d'intérêts impliquant un ministre, il est probable que l'on demanderait que le rapport du Conseiller en éthique soit rendu public. Cela semblerait en tout cas approprié.

Toutefois, une affaire impliquant un fonctionnaire pourrait ne pas avoir attiré l'attention du public et il n'y aurait donc aucun besoin de publier les résultats. Par exemple, si un sous-chef demandait une enquête dans son ministère, le rapport définitif devrait être présenté au sous-chef et à personne d'autre. De même, si un ministre demande une enquête sur certaines activités d'un membre de son personnel soustrait, c'est à lui seul que devrait être présenté le rapport définitif.

L'important, pour que le Bureau de l'éthique dans le secteur public conserve sa crédibilité, est que le rapport soit toujours présenté à la personne qui l'a demandé.

Nous avons étudié avec soin la question de savoir si le rapport du Conseiller en éthique à l'égard d'une affaire impliquant un ministre devrait être présenté au Premier ministre, qui aurait le choix de le déposer ou non, ou si ce rapport devrait être rendu public par le Conseiller en éthique. Nous préférons cette dernière solution. Autrement, le Premier ministre continue

de faire partie du problème au lieu de devenir un élément de la solution. Il faut un mécanisme net et indépendant pour faire enquête et faire rapport en cas d'allégation grave de conduite contraire à l'éthique et d'infraction aux règles d'éthique. Nous recommandons que le Conseiller en éthique transmette son rapport au Premier ministre avant de le rendre public (pour que le Premier ministre soit en mesure d'agir en temps opportun sur les conclusions du rapport) mais nous recommandons aussi que le Conseiller en éthique conserve le droit, voire le devoir, de rendre public son rapport sur un ministre. Nous sommes persuadés qu'il s'agit là d'une procédure acceptable. Rien n'oblige le Premier ministre à soumettre une affaire au Conseiller en éthique pour enquête; il décide lui-même si l'affaire est suffisamment grave pour mériter une enquête du Conseiller en éthique, avec toutes les conséquences que cela comporte nécessairement.

1) Rapports entre le Bureau de l'éthique dans le secteur public et les organismes centraux (Le Conseil du Trésor et la Commission de la Fonction publique)

Il reste à étudier comment la fonction consultative du Bureau de l'éthique dans le secteur public serait reliée à celles du Conseil du Trésor et de la Commission de la Fonction publique. Ces rapports doivent être bien établis et clairement définis dès le départ.

Deux domaines touchant l'éthique relèvent présentement de la Commission de la Fonction publique. En premier lieu, c'est la Commission qui établit les politiques et donne des conseils au sujet de l'activité politique placée sous l'empire de l'article 32 de la Loi sur l'emploi dans la Fonction publique. Puisqu'il est proposé que l'article 32 soit retranché de cette loi et relève du Bureau de l'éthique dans le secteur public, il semble qu'il ne serait plus nécessaire que la Commission de la Fonction publique s'occupe de cette question. Et parce que le rôle du comité consultatif sur les emplois ultérieurs des fonctionnaires serait assumé par le Bureau de l'éthique, la Commission n'aurait plus de rôle à jouer dans ce domaine non plus.

C'est le Secrétariat du Conseil du trésor qui est présentement chargé d'établir les politiques et de donner des conseils dans le domaine des conflits d'intérêts et des normes de conduite à l'intention des fonctionnaires. Les conflits d'intérêts, qui ressortissent de la politique du personnel, devraient continuer de relever du Conseil du Trésor. En cas d'infraction aux lignes directrices sur les conflits d'intérêts, le fonctionnaire est soumis à des mesures disciplinaires, qui relèvent également de la politique du personnel. Il semblerait raisonnable que ces deux éléments demeurent ensemble. Autrement, le Bureau de l'éthique dans le secteur public devrait assurer des services de consultation et d'interprétation à tous les ministères de la fonction publique.

Dans ce cas, il y aurait deux sources de renseignements à la disposition d'un sous-chef désireux d'obtenir des conseils sur une question d'éthique. Manifestement, le sous-chef aurait le choix entre une source ou l'autre, ou pourrait s'adresser aux deux. Il faudrait donc une étroite liaison entre le Conseiller en éthique et la Direction de la politique du personnel du Conseil du Trésor pour assurer l'uniformité des conseils et des directives et il faudrait que les deux organismes conviennent de la norme d'éthique à maintenir dans certains cas précis. Il y aurait des contacts considérables lors des premiers stades de la mise sur pied du Bureau de l'éthique dans le secteur public afin de formuler le partage des responsabilités et de déterminer les points de rencontre éventuels.

Bien que ce soit le Conseil du Trésor qui s'occupe actuellement de la politique sur les emplois ultérieurs des anciens fonctionnaires, il n'a aucun pouvoir d'appliquer les lignes directrices aux personnes qui ont quitté la fonction publique. Si celles-ci désirent des conseils, elles devraient, en vertu du régime actuel, consulter le Comité consultatif sur les emplois ultérieurs.

Compte tenu des fonctions du Bureau de l'éthique dans le secteur public exposées à la section i) du présent chapitre, et compte tenu du fait qu'il est souhaitable de maintenir, dans toute la mesure du possible, les structures et les mécanismes actuels à l'égard de l'éthique dans la fonction publique, le partage final des responsabilités pour les divers aspects de l'éthique serait le suivant:

- Conflits d'intérêts

Le Bureau de l'éthique dans le secteur public serait chargé d'établir la politique conformément à la Loi sur l'éthique dans le secteur public, de l'administration de la politique et des procédures y afférentes pour les ministres, le personnel soustrait des ministres, les secrétaires parlementaires et les personnes nommées par le gouverneur en conseil; le Bureau serait chargé de fournir des conseils à ces groupes et d'administrer la politique ainsi que toutes les procédures y afférentes pour les fonctionnaires en ce qui a trait à la mise sur pied et au maintien de fiducies en compte bloqué.

Le Conseil du Trésor continuerait de se charger de l'administration de la politique et des procédures pour les fonctionnaires, et de donner des conseils et une orientation aux ministères.

- Après-mandat

Le Bureau de l'éthique dans le secteur public serait chargé d'établir la politique en vertu de la Loi sur l'éthique

dans le secteur public, d'administrer la politique et les procédures y afférentes pour les ministres, le personnel soustrait des ministres, les secrétaires parlementaires, les personnes nommées par le gouverneur en conseil et les fonctionnaires, de donner des conseils et des orientations au besoin et d'étudier les cas qui pourraient être susceptibles d'exemption.

Le Conseil du Trésor ne jouerait aucun rôle dans ce domaine, si ce n'est pour s'assurer que tous les fonctionnaires à qui s'appliquent les lignes directrices sur l'après-mandat sont au courant, lors de l'embauche, de leur obligation de s'y conformer.

- Commentaires publics

Le Bureau de l'éthique dans le secteur public serait chargé d'établir la politique en vertu de la Loi sur l'éthique dans le secteur public et de donner des conseils aux personnes nommées par le gouverneur en conseil. Comme le Conseil du Trésor n'aurait plus aucun rôle à jouer dans ce domaine, c'est le Conseiller en éthique qui serait chargé de fournir des conseils d'ordre pratique aux ministères.

- Activités politiques

Le Bureau de l'éthique dans le secteur public serait chargé d'établir la politique en vertu de la Loi sur l'éthique dans le secteur public et de donner des conseils et des interprétations. Comme la Commission de la Fonction publique n'aurait plus aucun rôle à jouer dans ce domaine, c'est le Conseiller en éthique qui serait chargé de fournir des conseils d'ordre pratique aux ministères.

Les sous-chefs continueraient d'appliquer les politiques gouvernementales dans leurs ministères et organismes à l'égard des conflits d'intérêts, de l'après-mandat et des activités politiques.

m) Rapports avec les sociétés de la Couronne

L'interaction entre le Bureau de l'éthique dans le secteur public et les sociétés de la Couronne est abordée au chapitre 17.

n) Rapports annuels

Afin de permettre au Parlement de discuter de l'activité du Conseiller en éthique et du Bureau de l'éthique dans le secteur public, nous recommandons que ce dernier soit tenu, comme les autres organismes gouvernementaux, de présenter chaque année au Premier ministre un rapport que celui-ci déposera à la Chambre. Nous recommandons en outre qu'à la même occasion, le Premier

ministre saisisse la Chambre des initiatives prises à l'égard des titulaires de charges publiques qui auront négligé de se conformer aux règles de conduite ou aux procédures, des peines qui leur auront été imposées et des accusations qui auront été portées en vertu du Code criminel ou de toute autre loi.

CHAPITRE 14

RÈGLES RÉGISSANT L'APRÈS-MANDAT

a) Introduction

Nous reconnaissons sans hésitation le besoin et l'opportunité d'exiger des titulaires de charges publiques qu'ils observent des normes de conduite et des règles de procédure destinées à réduire au minimum les conflits d'intérêts. Nous avons donc longuement examiné la question de savoir ce qu'il conviendrait de faire, le cas échéant, ou ce que l'on pourrait faire, pour limiter les activités professionnelles des anciens titulaires, au terme de leur mandat.

Il est significatif de noter que la plupart des commentaires qui nous ont été communiqués, soit par écrit, soit au cours d'entrevues, portaient sur la question de la période suivant l'expiration du mandat; presque tous nos interlocuteurs ont jugé sévèrement les lignes directrices actuelles.

À ce propos, on note qu'aux États-Unis, avant l'adoption en 1978 de la "Ethics in Government Act", on disposait de peu de renseignements quant aux retombées des restrictions imposées durant "l'après-mandat" sur le recrutement et la durée d'emploi des employés de l'État. Un auteur américain a fait remarquer: On a fait valoir, non sans mérite, qu'en l'absence de telles données, il n'est pas possible d'analyser les coûts et avantages comparatifs des lois, si ce n'est en termes généraux.[1]

On pourrait faire la même observation en ce qui concerne l'application, au Canada, au cours de la dernière décennie, des lignes directrices concernant les conflits d'intérêts. Pour nous documenter sur les incidences de celles-ci sur l'après-mandat et sur le recrutement, nous avons discuté de la question avec les fonctionnaires du Bureau du Conseil privé chargés de les administrer. De nombreuses personnes assujetties aux lignes directrices concernant l'après-mandat nous ont communiqué des présentations écrites à ce sujet et nous ont fait part verbalement de leurs commentaires; nous avons aussi examiné les incidences de la politique actuelle, de concert avec d'éventuels candidats

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1 Morgan, Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency, 1 Duke L.J. 29 (1980).

à un emploi dans le secteur public, et nous avons réuni des données statistiques sur des questions comme le nombre et le genre de fiducies déjà constituées.

Nous ne prétendons pas que nos recherches ont été rigoureusement scientifiques, mais elles n'ont pas non plus été qu'un simple exercice de style. En gros, nous en sommes arrivés à la conclusion que les lignes directrices qui régissent actuellement l'après-mandat créent inutilement des problèmes dans un grand nombre de cas et nuisent au recrutement du personnel compétent dont le gouvernement a besoin.

b) Nature du problème de l'après-mandat

Même si ce sont les activités d'un individu qui peuvent être jugées inconvenantes ou contraires aux principes de l'éthique, "l'après-mandat" pose un problème au gouvernement plutôt qu'à l'individu, car il n'a pas trait à la période de la retraite, mais plutôt au fait qu'un agent quitte le service de l'État pour travailler dans le secteur privé. Lorsque l'intéressé prend sa retraite, accepte un emploi au niveau provincial ou autre, ou occupe un autre poste au fédéral ou dans une université, "l'après-mandat" ne fait pas vraiment problème sauf lorsque l'ex-employé de l'État fait des placements en tirant parti de renseignements confidentiels qui ne sont pas accessibles au public en général, ou qu'il utilise des renseignements confidentiels dans des écrits ou des cours pour lesquels il touche une rémunération.

À notre avis, les facteurs principaux qui justifient la limitation des activités professionnelles des titulaires de charges publiques au terme de leur mandat sont les suivants: 1) le titulaire a peut-être profité de son mandat pour améliorer ses chances d'emploi dans le secteur privé; 2) l'ex-titulaire bénéficie peut-être encore d'un accès privilégié auprès de ses collègues encore dans l'administration publique; 3) l'ex-titulaire bénéficie peut-être d'un traitement de faveur dans ses rapports avec l'administration publique et 4) une personne du secteur privé qui emploie un ex-titulaire de charge publique ou le nomme administrateur ou membre de la direction bénéficie peut-être d'un avantage concurrentiel du fait de ses connaissances spécialisées, des renseignements confidentiels qu'il possède ou de l'influence qu'il pourrait avoir auprès du gouvernement.

Nous croyons qu'une personne qui quitte le service de l'État est en possession de deux genres de renseignements : d'une part, ceux qui portent sur la structure gouvernementale, sur la nature des activités et les personnes qui les exercent, en bref, des renseignements sur le fonctionnement des institutions gouvernementales; d'autre part, des renseignements confidentiels concernant des politiques éventuelles, des données non encore communiquées au public, et des renseignements d'initiés concernant des unités du secteur privé assujetties à la réglementation

gouvernementale. À notre avis -- et c'est aussi l'opinion d'un grand nombre de personnes avec qui nous en avons discuté -- la communication au secteur privé du premier genre de renseignements est manifestement dans l'intérêt du public. Ce sont les renseignements de la seconde catégorie qui doivent être protégés et, pour ce motif, il importe de définir des règles applicables à ceux qui les possèdent.

c) Le principe fondamental et son application

Selon le dixième principe du code d'éthique, les anciens titulaires de charges publiques ont le devoir d'agir de façon à ne pas mettre en doute la probité et l'intégrité de l'appareil gouvernemental et à ne diminuer en rien la confiance du public dans l'intégrité du gouvernement.

En ce qui concerne les règles de procédure visant à minimiser les conflits d'intérêts, et qui seront promulguées sous forme de règlement en vertu de la Loi sur l'éthique dans le secteur public, nous recommandons que des dispositions détaillées soient prévues de manière que les titulaires actuels de charges publiques, et les anciens, puissent interpréter ou appliquer ce principe. Au chapitre 3, nous complétons l'examen de "l'après-mandat" par le commentaire suivant: "sous réserve de restrictions précises à l'égard de la période qui s'est écoulée depuis leur départ et de leurs liens avec leurs anciennes tâches, les anciens titulaires de charges publiques devraient pouvoir aider les personnes physiques ou morales du secteur privé dans leurs rapports avec le gouvernement." À notre avis, les règles de procédure visant à minimiser les conflits d'intérêts devraient préciser ce délai et ces liens, tout comme les lignes directrices concernant les emplois ultérieurs à une charge publique ont tenté de le faire. Avant de présenter des recommandations au sujet des limites à stipuler, nous ferons quelques observations générales concernant les principes ou règles pratiques applicables à cette question épineuse de l'après-mandat.

L'élaboration d'une procédure d'application du dixième principe du Code d'éthique doit tenir compte de six points ou notions fondamentales.

En premier lieu, c'est avant qu'un titulaire quitte son poste qu'il importe de soulever la question des conflits d'intérêts de l'après-mandat, car on peut alors prendre les mesures de prévention requises (en demandant, par exemple,au titulaire de convenir de limiter à certains égards son activité professionnelle à l'expiration de son mandat dans l'administration publique).

En deuxième lieu, il est généralement plus facile de faire respecter ces règles lorsque les titulaires sont en poste puisqu'on peut les tenir responsables de leurs décisions et leur imposer des sanctions. Les règles actuelles ne permettent aucun

recours direct contre les ex-titulaires de charges publiques. Il y a aussi le revers de la médaille: selon les règles actuelles, un ancien titulaire de charge publique qui est accusé d'avoir dérogé aux lignes directrices ne peut se défendre contre toute allégation de conduite indigne si ce n'est par le biais des médias; on sait que ce moyen n'est pas nécessairement le plus indiqué.

Troisièmement, qu'il s'agisse d'un représentant élu ou d'une personne nommée, la période de transition entre l'expiration du mandat et l'obtention d'un poste dans le secteur privé devrait tenir compte des circonstances particulières de l'intéressé lorsqu'il est au service de l'État et ne pas lui imposer de contraintes indues. En bref, plus les règles seront spécifiques et s'inspireront de cas particuliers, moins elles risqueront de donner lieu aux injustices suscitées par des règles générales de grande portée.

En quatrième lieu, les échanges entre l'administration publique et le secteur privé devraient être encouragés de façon à permettre au gouvernement de bénéficier de l'expérience des personnes qui ont oeuvré dans le secteur privé, et à ces dernières d'avoir une meilleure compréhension des rouages gouvernementaux. Ce qui importe, c'est de prendre les mesures voulues pour que les perspectives d'emploi dans le secteur privé n'influent pas sur les décisions des titulaires de charges publiques, et pour que les entreprises ne puissent pas s'assurer d'avantages indus sur leurs concurrents en recrutant des anciens titulaires de charges publiques qui possèdent des renseignements récents sur leurs concurrents et sont disposés à les divulguer.

Cinquièmement, grâce à un pouvoir discrétionnaire, les anciens titulaires de charges publiques devraient pouvoir accepter un emploi dans le secteur privé après avoir présenté une demande de levée ou de modification de la période de transition et obtenu d'un responsable (par exemple le Conseiller en éthique) l'assurance que ledit emploi ne pose aucun conflit d'intérêts.

Sixièmement, les règles régissant l'emploi à l'expiration d'un mandat devraient être libellées de façon beaucoup plus spécifique, de manière à éclairer les personnes qui s'apprêtent à quitter le service de l'État quant aux activités qu'elles pourront ou non exercer. De telles précisions seraient utiles, non seulement à l'ex-titulaire de charge publique, mais aussi à l'employeur du secteur privé et aux fonctionnaires avec lesquels il pourrait avoir des contacts.

Le premier de ces six points, qui consiste à convenir avec le titulaire, avant qu'il quitte le service de l'État, des rapports à observer à l'expiration de son mandat, est plus facilement applicable aux personnes nommées qu'aux ministres du Cabinet. En effet, ceux-ci ne savent pas toujours ce que leur

réserve l'avenir: ils ignorent combien de temps ils exerceront leurs fonctions car le Premier ministre peut les prier de démissionner, ou ils peuvent perdre leur siège aux élections.

Il est rare qu'un ministre démissionne de son gré pour accepter un emploi dans le secteur privé. Quand cela se produit, c'est généralement pour diverses raisons, dont un désaccord avec les orientations gouvernementales. Le Premier ministre peut demander aux ministres de lui faire part de leurs projets d'emploi à l'expiration de leur mandat, mais ceux-ci ne sont pas nécessairement disposés à le faire au moment de leur démission. Il est douteux que des règles dans ce sens (comme celles que comportent les lignes directrices actuelles applicables aux ministres) soient de quelque utilité.

Pour ce qui est des personnes nommées à une charge publique, on peut les prier de ne pas accepter d'offre d'emploi du secteur privé avant d'en avoir obtenu l'approbation de leur ministre ou de leur sous-ministre. Si l'approbation n'est pas donnée, rien ne peut empêcher l'intéressé de démissionner et d'accepter le poste. Dans la plupart des cas cependant, l'intéressé qui souhaite faire bonne impression sur son nouvel employeur ne s'engagera pas dans cette voie, car il s'exposerait à des critiques, et même à un ostracisme officiel. En outre, celui qui va à l'encontre des avis de ses supérieurs n'est probablement pas un employé que le gouvernement voudrait garder à un poste de responsabilité.

Cela nous amène au deuxième point : il est plus facile d'appliquer les règles relatives à l'après-mandat alors même que l'intéressé exerce encore ses fonctions (et traite peut-être avec un ancien agent de l'État) plutôt qu'après son départ. Ici encore, il convient de souligner les distinctions qui existent entre un ex-ministre et une personne nommée à une charge publique qu'elle a cessé d'occuper. Un ex-ministre ne peut influer sur les décisions gouvernementales que si son parti est au pouvoir. Si c'est le cas, on suppose que l'ex-ministre fera l'objet d'une attention particulière, surtout de la part de son successeur. En revanche, si son parti a été défait, il ne risque pas d'avoir de faveur, et les fonctionnaires en place useront probablement de circonspection dans leurs rapports avec lui. Par contre, dans une fonction publique non partisane, les personnes nommées qui ont cessé d'occuper une charge publique peuvent continuer d'avoir des contacts et des amitiés, quel que soit le parti au pouvoir.

La question de savoir qui est responsable de la violation des règles régissant les rapports entre les anciens titulaires de charges publiques et le gouvernement est cruciale. D'une certaine manière, il est peut-être injuste d'en attribuer au premier chef la responsabilité aux anciens titulaires qui sont en général mal placés pour se défendre lorsque l'on allègue l'incorrection de leurs rapports avec le gouvernement. On se méfie même

des contacts les plus transparents, et l'intéressé ne peut se défendre lorsque les allégations sont faites à la Chambre des communes. Un ministre peut répondre de ses actes et de ceux de ses officiels. Si on peut démontrer qu'il y a eu effectivement traitement de faveur ou conduite malséante, l'ancien ministre, comme son successeur d'ailleurs, perdront l'estime du public, ce qui est normal. C'est peut-être là l'une des sanctions les plus efficaces car elle a pour effet d'inhiber ce genre de comportement.

Les règles relatives aux activités professionnelles de l'après-mandat ne doivent pas cependant être formulées de manière a imposer à un ancien ministre le fardeau de la preuve. Nous estimons que les ex-ministres du Cabinet, au Canada, méritent qu'on leur accorde le bénéfice du doute en ce qui concerne leur conduite. Il serait injuste de fonder autrement la politique du gouvernement.

Les règles ou lignes de conduite qui régiront l'après-mandat des ministres et des personnes qui ont été nommées à une charge publique seront celles qu'ils auront promis d'observer alors qu'ils exerçaient encore leurs fonctions (comme c'est le cas du serment d'office et de tout document écrit qu'ils auront signé) ou celles qui auront force obligatoire (comme le Code d'éthique que nous proposons). Même si ces règles étaient modifiées après l'expiration de leur mandat, on peut présumer qu'elles ne seraient pas rétroactives. Ce qui milite en faveur du réexamen de cet aspect particulier des règles et lignes de conduite régissant l'après-mandat.

La période de transition imposée aux anciens titulaires de charges publiques a un double objet: d'abord, celui de minimiser les conflits d'intérêts au moment où un titulaire se voit offrir un poste par le secteur privé et, deuxièmement, minimiser l'avantage que pourrait tirer un employeur de l'information et de l'influence (ne pas confondre avec expertise) que possède un employé et qui le favoriseraient par rapport à ses concurrents.

Lorsqu'un ministre est forcé d'abandonner son portefeuille, ses chances d'emploi ne devraient pas être entravées inutilement par des restrictions qui constitueraient manifestement une injustice envers lui. Ce facteur suffirait à dissuader des personnes de talent d'entrer dans la vie publique. Il n'y a pas de doute qu'il serait mal venu de la part d'un ancien ministre, d'entrer immédiatement au service d'une entreprise dont il avait la responsablité ou avec laquelle il a eu des rapports avant de laisser sa charge. En revanche, compte tenu de sa formation personnelle ou de son experience ministérielle, il arrive souvent qu'un ancien ministre soit particulièrement qualifié pour occuper un poste dans ce même domaine d'expertise. Prenons le cas d'un ministre de l'Industrie et du Commerce. Dans les meilleures conditions, on suppose que le titulaire sera un entrepreneur qui

possède une expérience considérable du commerce et de l'industrie. Si cette personne redevient entrepreneur à l'expiration de son mandat, gère une entreprise existante ou lance sa propre entreprise, il est impensable qu'elle ne puisse communiquer avec son ancien ministère au sujet de subventions, d'aide à l'exportation ou de réglementation, étant donné la grande interaction qui existe actuellement entre le gouvernement et l'industrie. Selon les lignes directrices à l'intention des ministres à l'heure actuelle, un ex-ministre aurait du mal à redevenir entrepreneur -- mais il aurait de plus grandes difficultés encore à gagner sa vie s'il devait se chercher un emploi dans un domaine sans rapport aucun avec son expertise. Il ne lui convient peut-être pas de devenir professeur dans une université et, par ailleurs, il n'est pas dans l'intérêt du pays de l'empêcher d'exercer son métier d'entrepreneur.

L'observation par l'ancien ministre d'une période raisonnable de transition est sans doute tout autant dans l'intérêt du public que dans le sien. Manifestement, deux ans est une période indûment longue et certainement injuste à l'égard du ministre qui a été forcé de démissionner. Même une année est une période qui paraît indûment longue. Il ne faut pas oublier que si un ancien ministre décide de passer outre à toute règle ou lignes directrices, il devient difficile d'imposer les sanctions appropriées. C'est ce qu'il importe d'avoir à l'esprit au moment de définir une politique officielle qui ait des chances d'être observée.

La situation des personnes nommées à des charges publiques qui quittent volontairement leur poste pour occuper un emploi dans le secteur privé n'est pas la même que celle des ministres mais, même dans leur cas, la période de transition ne devrait pas être excessive. Advenant un problème sérieux qui préoccupe le gouvernement, il serait plus équitable envers le titulaire et plus efficace du point de vue de l'intérêt public de lui accorder un congé payé avant qu'il n'occupe ses nouvelles fonctions. Dans le passé, cette solution a été adoptée à l'occasion. Si le gouvernement estime qu'il a des intérêts à protéger et qu'il peut le faire en imposant une période de transition avant que l'ex-titulaire n'occupe ses nouvelles fonctions dans le secteur privé, nous estimons qu'il revient au gouvernement d'en faire les frais. Au plan administratif, cela peut se faire en continuant de rémunérer l'intéressé même s'il n'occupe plus ses fonctions (ou exerce des tâches qui n'ont aucun rapport avec les fonctions du poste qu'il doit occuper dans le secteur privé), et ce au cours du nombre de mois que l'on juge suffisant pour couper les liens avec son ancien employeur avant d'occuper ses nouvelles fonctions.

Ce qui est étonnant, c'est que lorsque le gouvernement cherche à recruter une personne du secteur privé, il tient à s'assurer les services du candidat le plus compétent et il

s'attend à ce que celui-ci occupe ses fonctions sans délai et sans période de transition, surtout si le poste exige d'être à la fine pointe de l'information.

Quoi qu'il en soit, une période de transition ne devrait être stipulée que dans des circonstances soigneusement définies. Comme nous l'avons souligné à propos du quatrième point, l'échange de personnel entre le gouvernement et le secteur privé devrait être assujetti à un minimum de restrictions.

En résumé, nous estimons que la politique gouvernementale concernant l'activité professionnelle de l'après-mandat doit tenir compte de plusieurs facteurs: dans certains cas, il importe d'interdire explicitement les volte-face; dans d'autres cas, il est nécessaire d'empêcher les anciens titulaires de charges publiques d'user de l'influence qu'ils ont auprès d'amis ou de relations personnelles; dans d'autres cas encore, il importe de trouver les moyens d'interdire l'utilisation indue de renseignements d'initiés obtenus dans l'exercice de leur charge.

Comme nous l'avons déjà souligné, les règles qui régiront l'activité professionnelle de l'après-mandat devront établir une distinction fondamentale entre les ministres et les personnes nommées à une charge publique.

Au chapitre 9 du présent rapport, nous avons rappelé l'erreur qui a été commise, à notre avis, lorsque, pour des raisons d'uniformité plutôt que de bon sens, les lignes directrices concernant l'après-mandat des fonctionnaires ont été appliquées aux ministres du Cabinet sans tenir compte des différences essentielles qui existent entre ces deux catégories. En raison de ces différences, nous estimons qu'il conviendrait de ne pas commettre la même erreur lorsqu'il y aura refonte de la politique fédérale en matière de conflits d'intérêts et définition de la procédure à suivre. Comme nous l'avons noté précédemment, de telles restrictions relatives à l'après-mandat ne sont pas imposées aux ministres dans la plupart des autres juridictions et, à en juger par l'expérience canadienne, il n'existe aucun motif sérieux pour l'administration fédérale de se démarquer de cette norme. Au cours de nos délibérations, nous avons même été tentés de suivre l'exemple de la Grande-Bretagne, de l'Australie et de neuf des dix provinces canadiennes et de recommander le rejet pur et simple de toute restriction sur l'activité professionnelle des ministres à l'expiration de leur mandat.

Il y aurait cependant des avantages à restreindre à certains égards et pendant une période raisonnable les activités professionnelles d'ex-titulaires de charges publiques, pourvu que ces restrictions puissent être respectées. Nos recommandations visent à augmenter la confiance du public envers le gouvernement. Il est certain que ce but n'est pas atteint lorsque d'anciens officiels ou ministres font du lobbying auprès de leurs

successeurs ou anciens collègues peu après avoir quitté leurs fonctions, ou acceptent un emploi ou un poste d'administrateur dans des sociétés dont ils assuraient antérieurement la réglementation, ou qui ont obtenu des contrats ou des subventions de leur ministère; il n'est pas non plus à l'avantage du gouvernement que ces anciens titulaires fassent volte-face dans toute affaire dont ils se sont occupés de près pour le compte du gouvernement.

d) Recommandations concernant l'après-mandat

Il est recommandé d'intégrer les dispositions suivantes concernant l'après-mandat aux règles de procédure visant à minimiser les conflits d'intérêts, et qui seront promulguées sous forme de règlement en vertu du projet de loi sur l'éthique dans le secteur public, ainsi qu'aux codes de conduite complémentaires des ministères, organismes et sociétés de la Couronne, et aux modifications aux lois régissant les organismes quasi-judiciaires. Ces dispositions portent notamment sur 1) l'acceptation d'un poste d'administrateur, d'une charge ou d'un emploi; 2) les représentations auprès du gouvernement; 3) l'utilisation de renseignements confidentiels à des fins personnelles; 4) les volte-face; 5) la demande de levée ou de modification des règles dans certains cas; 6) l'abolition des comités consultatifs actuels; 7) les dispositions contractuelles, s'il y a lieu; 8) les dispenses dans le cas de renseignements scientifiques et techniques; 9) la dispense de témoigner sous serment et 10) le besoin d'informer le supérieur hiérarchique des projets d'emplois pour l'après-mandat.

i) Poste d'administrateur ou autre charge

Nous recommandons d'imposer un minimum de restrictions et de les définir aussi rigoureusement que possible.

Ministres. A notre avis, il serait indiqué de suivre l'exemple d'autres pays à régime parlementaire qui ne prescrivent d'autre règle que celles qui figurent dans le Code d'éthique proposé et qui imposent aux ex-titulaires de charges publiques le devoir d'éviter toute action qui risque de porter atteinte à la probité et à l'impartialité du processus gouvernemental, ou de nuire de quelque façon à son intégrité.

Toutefois, si le gouvernement estime qu'une règle particulière de procédure serait souhaitable concernant la période de transition, celle-ci ne devrait pas, à notre avis, excéder six mois avant l'acceptation d'un poste d'administrateur, d'une autre charge ou d'un emploi dans une société ou organisation qui a eu des rapports particuliers avec le ministère ou les ministères dont le ministre avait la charge au cours de l'année précédant son départ. (À ce propos, nous recommandons de conserver essentiellement la définition des "rapports particuliers" contenue dans les

lignes directrices actuelles et de ne remplacer que l'expression "société commerciale" par "société ou organisation". Par "rapports particuliers" on entend la réglementation à laquelle la société ou l'organisation est assujettie par le ministère ou l'organisme, les subventions, prêts ou autre assistance obtenus du ministère ou de l'organisme par la société ou organisation, et les contrats passés entre la société ou organisation et le ministère ou l'organisme). Il ne devrait pas y avoir d'autre restriction.

Secrétaires parlementaires. La même règle de six mois devrait s'appliquer aux secrétaires parlementaires.

Personnel soustrait des ministres. La même règle de six mois devrait s'appliquer au personnel soustrait à moins que le ministre n'ait pris d'autres dispositions et indiqué quels sont les membres de son personnel qui doivent être assujettis aux règles régissant l'après-mandat des titulaires non élus de charges publiques.

Titulaires non élus de charges publiques. Comme ce groupe est moins vulnérable aux aléas de la politique que les ministres, nous recommandons une période de transition un peu plus longue de manière à ne pas donner l'impression qu'ils ont profité de leur charge pour se préparer à occuper un emploi avec une société ou une organisation qui avait des rapports particuliers avec leur ministère. Nous recommandons donc que les sous-ministres, les personnes nommées par le gouverneur en conseil à des postes à temps plein (à l'exception des juges, des membres d'organismes quasi-judiciaires et des sociétés de la Couronne qui sont ou seront assujettis à d'autres règles) et tous les autres titulaires de charges publiques s'abstiennent pendant une année d'accepter une charge ou un poste d'administrateur ou un autre emploi dans une société ou organisation avec laquelle leur ministère ou organisme a eu des rapports particuliers au cours de l'année précédant immédiatement leur départ.

Dans certains cas, une telle règle de six et de douze mois pourrait entraver inutilement les démarches d'anciens titulaires de charges publiques élus ou non élus en vue de se trouver une situation dans le secteur privé. C'est pourquoi nous recommandons de reconnaître à un ancien titulaire de charge publique le droit de s'adresser au Conseiller en éthique pour obtenir la réduction ou la levée de cette période de transition lorsqu'elle paraît injuste et qu'il n'y a aucun risque de violation du code d'éthique. Voir la procédure décrite plus loin en v).

ii) Représentations auprès du gouvernement

À certains égards, ce sont les restrictions portant sur les rapports des anciens titulaires avec le gouvernement qui posent le plus de difficultés. Les lignes directrices actuelles interdisent aux anciens titulaires de faire du lobbying pendant

une certaine période. Ce terme, qui a été interprété de diverses façons dans le passé, devrait à notre avis être évité désormais. Tout autre terme décrivant les rapports entre les intérêts privés et le gouvernement fait aussi problème. Nous avons donc fixé notre choix sur le mot "représentations" qui est plus général et n'est pas considéré comme étant péjoratif. C'est parfois le cas du lobbying.

À notre avis, la seule façon efficace de traiter du problème des représentations auprès du gouvernement est d'imposer aux titulaires en place le devoir de s'abstenir d'accorder un traitement de faveur aux anciens titulaires de charges publiques. En vertu du Code d'éthique proposé, un titulaire de charge publique sera tenu désormais de respecter non seulement le code mais aussi toute règle de procédure qui pourrait être définie concernant l'après-mandat; il sera aussi tenu, dans ses rapports avec d'anciens titulaires de charges publiques, de se comporter de manière à ne jamais compromettre l'autorité de son poste ni celle de son ministère, conseil, organisme ou société de la Couronne. Le fait de faire des représentations auprès d'un ministère dont il a été le ministre ou le sous-ministre ou autre responsable n'est pas en soi répréhensible. Ce qui importe, c'est de déterminer s'il bénéficie de privilèges qui ne sont pas accordés à d'autres personnes dans des circonstances semblables.

Ici encore, nous évitons de proposer des règles qui ne pourraient être interprétées ni appliquées, ne serait-ce que parce qu'elles susciteraient du cynisme à l'égard de l'ensemble des règles de conduite. Nous préférons donc nous en tenir aux principes généraux du Code d'éthique proposé. Il est possible cependant que le gouvernement de l'heure préfère d'autres modalités. S'il veut aller plus loin et préciser la durée de la période de transition que doit respecter un ancien titulaire d'une charge publique, ministre ou autre, avant de faire des représentations auprès du ministère qui l'employait au cours de la dernière année, nous recommandons que cette période n'excède pas un an.

Plus précisément, cette règle pourrait être énoncée comme suit: au cours de l'année qui suit la date de l'expiration de son mandat, un ancien titulaire de charge publique doit s'abstenir de faire auprès du ministère (conseil, organisme ou société de la Couronne qui en relève) dont il avait la charge ou qui l'employait au cours de l'année précédant immédiatement l'expiration de son mandat, toute représentation pour son propre compte ou pour le compte de toute autre personne ou groupe de personnes qui pourrait bénéficier directement ou indirectement de telles représentations, si celles-ci sont faites moyennant contrepartie financière ou autre avantage tangible, direct ou indirect.

Un ancien ministre ou secrétaire parlementaire qui continue d'occuper son siège de député à la Chambre des communes

demeure assujetti, non seulement à la règle d'un an, mais aussi aux dispositions de la Loi sur le Sénat et la Chambre des communes concernant les représentations et les conflits d'intérêts.

Nous recommandons que cette règle d'un an s'applique à tout le secteur public, qu'il s'agisse de ministres, de secrétaires parlementaires, du personnel soustrait des ministres, des sous-ministres et autres personnes nommées par le gouverneur en conseil à des postes à temps plein (à l'exception des juges et des membres des organismes quasi-judiciaires qui seront sans doute assujettis à d'autres règles) des fonctionnaires et du personnel des sociétés de la Couronne. Des règles plus rigoureuses pourront être définies dans les codes d'éthique complémentaires, si on le juge à propos.

iii) Renseignements confidentiels

Nous recommandons que les libellés des divers serments d'office prêtés par les personnes qui sont nommées à des charges publiques soient révisés et clarifiés de manière à tenir compte de l'intention de protéger l'intégrité gouvernementale et de sauvegarder la nature confidentielle des renseignements durant l'après-mandat.

iv) Volte-face

Nous recommandons de maintenir la règle qui interdit à un ancien titulaire de charge publique non élu qui passe au secteur privé de faire volte-face en ce qui concerne une affaire précise dont il s'est personnellement occupé pour le compte du gouvernement, ou qui relevait de son autorité lorsqu'il occupait sa charge publique. Cette interdiction ne s'appliquerait pas uniquement dans le cas où un ancien titulaire passe au secteur privé mais également dans le cas où il accepte un emploi pour un autre gouvernement. Les lignes directrices actuelles imposent des délais durant lesquels toute volte-face est interdite (deux années pour les ministres). Comme il s'agit ici de questions précises, nous ne voyons aucun motif de limiter la durée de l'interdiction. A notre avis, elle devrait être permanente. Un avocat qui défend une cause ne peut jamais représenter la partie adverse. C'est de cela qu'il s'agit ici: un titulaire s'occupe étroitement et spécifiquement d'une affaire, d'une transaction ou d'un cas où le gouvernement du Canada est partie. On entend par là qu'il peut s'en occuper à titre personnel, ou en sa qualité officielle, ou à ce double titre.

La règle interdisant les volte-face ne serait pas indiquée dans le cas des représentants élus, car les ministres et les secrétaires parlementaires qui ont été étroitement associés à une affaire en particulier pourraient difficilement changer de camp après être passés au secteur privé sans s'exposer à une publicité qui nuirait à leur crédibilité et au domaine particulier dont ils s'occuperaient moyennant rémunération.

Dans de rares cas, cette règle générale n'est peut-être pas dans l'intérêt public. En l'occurrence, une demande pourrait être présentée au Conseiller en éthique selon la procédure prévue pour l'obtention d'une levée ou d'une modification de la restriction relative à l'après-mandat dont il est question ci-après en v).

v) Levée ou modification des règles relatives à l'après-mandat

Nous avons évoqué précédemment la difficulté de définir des règles d'application générale qui n'imposent pas de restrictions inutiles et pénibles aux anciens titulaire de charges publiques. À notre avis, et quelle que soit la période de transition, un ancien titulaire de charge publique devrait avoir le droit de solliciter du Conseiller en éthique une décision confirmant qu'il n'y a aucune raison de reporter ses projets d'emploi dans le secteur privé.

Dans certains cas, l'application de la règle régissant l'après-mandat (de six mois à un an), ou celle de la règle interdisant les volte-face pourrait entraîner des résultats indésirables ou ne pas être dans l'intérêt public. Lorsque des cas humanitaires se posent ou que l'action envisagée n'est aucunement en violation du Code d'éthique, nous recommandons qu'un ancien titulaire de charge publique puisse présenter au Conseiller en éthique une demande exposant les motifs pour lesquels la règle devrait être levée et indiquant dans quelle mesure elle devrait être modifiée dans son cas en particulier. En outre, nous recommandons que le Conseiller en éthique justifie par écrit sa décision et indique clairement dans quelle mesure (le cas échéant) la règle est modifiée ou suspendue, qu'il prenne sa décision rapidement, la rende publique et en dépose un exemplaire au Registre public du Bureau de l'éthique dans le secteur public.

À notre avis, le Premier ministre serait habilité à prendre l'initiative de présenter au Conseiller en éthique pour le compte d'un ancien ministre, secrétaire parlementaire ou autre titulaire une requête en vue d'obtenir une levée ou une modification. Les résultats de la décision devraient être publiés par le Conseiller en éthique.

Une telle demande doit être présentée au préalable, et non après la violation de la règle régissant l'après-mandat.

vi) Abolition des comités consultatifs actuels

Nous recommandons que les modalités qui précèdent et qui prévoient, dans des cas précis, l'intervention du Conseiller en éthique pour l'application des règles régissant l'après-mandat remplacent le comité consultatif des ministres (qui a le pouvoir

de dispenser un ancien ministre des règles de conduite en vigueur), le comité consultatif des fonctionnaires, le comité consultatif des personnes nommées par décret et le comité consultation du personnel soustrait (chacun de ces comités a des pouvoirs semblables de dispense en ce qui concerne ces trois derniers groupes).

vii) Dispositions contractuelles concernant l'après-mandat

Nous recommandons que la personne à qui est confiée une charge publique, en vertu d'un contrat conclu avec Sa Majesté du chef du Canada, s'engage explicitement à respecter les dispositions du Code d'éthique ainsi que les règles régissant les activités permises durant l'après-mandat.

Contrairement aux lignes directrices en vigueur actuellement, un tel contrat engagerait la responsabilité du signataire et il aurait force exécutoire durant l'après-mandat, s'il est passé selon les formes admises.

viii) Dispense dans le cas des renseignements scientifiques et techniques

Nous recommandons que les règles de procédure visant à minimiser les conflits d'intérêts, et les codes d'éthique complémentaires, prévoient une dispense des interdictions précitées durant l'après-mandat en ce qui concerne les renseignements scientifiques et techniques qu'un ex-titulaire de charge publique cherche à obtenir de son ancien ministère, office, organisme ou société de la Couronne, conformément à la procédure gouvernementale établie.

Une telle dispense permettrait l'échange de ce genre de renseignements, quelle qu'ait pu être par ailleurs la participation ou la responsabilité de l'ex-titulaire dans le domaine. Ainsi, dans la mesure où il procède selon les méthodes établies, un ex-titulaire chargé d'un projet pourrait communiquer avec les services gouvernementaux afin de déterminer le genre de renseignements requis, et si les renseignements déjà communiqués suffisent. À notre avis, c'est à chaque unité gouvernementale (ministère, office, organisme ou société de la Couronne) qu'il appartient au premier chef d'élaborer la procédure à observer en ce qui concerne les activités passibles d'une dispense, et d'adapter cette procédure à ses propres programmes et besoins. Il conviendrait que le Conseiller en éthique révise périodiquement ces procédures, qui seraient intégrées au code d'éthique de l'unité administrative intéressée.

Il serait bon que le ministère, l'office ou la société de la Couronne qui définit ses propres règles de procédure tienne compte des possibilités suivantes: restreindre la communication

aux domaines qui se prêtent le moins à l'exercice de l'influence personnelle; dans la mesure du possible, distinguer les réunions et les exposés portant sur des questions techniques de celles qui touchent d'autres domaines; exiger que la personne chargée de l'administration des règles d'éthique au ministère, à l'office, à l'organisme ou à la société de la Couronne soit informée des cas où on s'est prévalu d'une dispense; prévoir des pratiques plus restrictives pour les appels d'offres ou les demandes de subventions que pour un projet en cours.

ix) Dispense de témoigner sous serment

Nous avons traité précédemment des restrictions relatives aux renseignements confidentiels durant l'après-mandat. Aucune des règles régissant l'après-mandat ne doit être interprétée cependant de manière à empêcher un ancien titulaire de charge publique de témoigner devant un tribunal, une commission ou un corps législatif concernant des faits venus à sa connaissance alors qu'il exerçait sa charge.

En conséquence, nous recommandons d'intégrer la disposition suivante à la Loi sur l'éthique dans le secteur public:

> "Aucune disposition du Code d'éthique aucune règle promulguée en vertu de la présente loi ne peut in empêcher un ancien titulaire de charge publique de faire les déclarations requises sous peine de parjure."

Cette disposition ne permettrait pas, cependant, à un ancien titulaire de charge publique à qui il est interdit d'utiliser des renseignements confidentiels durant l'après-mandat de témoigner, en sa qualité d'expert, pour le compte d'un autre sauf 1) s'il peut témoigner qu'il a une connaissance personnelle des faits relatifs à la procédure en cours, et notamment de toute affaire à laquelle il a lui-même participé ou 2) dans une procédure où il a été établi qu'il n'est pas possible de recourir à un autre expert dans le domaine.

x) Informer le supérieur hiérarchique des projets d'emploi au terme du mandat

Les lignes directrices actuelles exigent des titulaires de charges publiques qu'ils fassent part à leurs supérieurs hiérarchiques de toute offre d'emploi qui risque d'être incompatible avec leurs fonctions officielles, de toute offre sérieuse d'emploi émanant d'organisations privées avec lesquelles il a eu des rapports officiels, et de toute offre d'emploi effectivement acceptée. Nous recommandons de conserver cette règle de la divulgation dans le cas de tous les anciens titulaires non élus de charges publiques, et qu'elle soit intégrée aux règles de procédures visant à minimiser les conflits d'intérêts.

Pour les motifs exposés précédemment, nous ne voyons pas l'utilité de règles qui exigent des ministres qu'ils consultent le Premier ministre concernant leurs projets d'après-mandat. Ils sont évidemment tout à fait libres de le faire s'ils le désirent.

CHAPITRE 15

RÈGLES RÉGISSANT LES ACTIVITÉS POLITIQUES ET LES CRITIQUES PUBLIQUES

a) Activités politiques et conduite professionnelle

Kenneth Kernaghan a écrit en 1973 qu'il existe un lien entre l'activité politique et la conduite professionnelle des fonctionnaires, en ce sens qu'appuyer ouvertement un parti politique peut empêcher ou paraître empêcher le titulaire d'une charge publique d'exercer ses fonctions de manière objective.[1]

Au chapitre 3, nous avons examiné la question des activités politiques des titulaires non élus de charges publiques et celle des critiques formulées par ceux-ci à l'égard de la politique et de l'administration gouvernementales. Au chapitre 7, nous avons brossé l'historique des lois et des lignes directrices fédérales en matière de conflits d'intérêts, ainsi que des dispositions concernant les activités politiques partisanes. Le chapitre 8 donne un résumé des dispositions actuelles, et principalement de l'article 32 de la Loi sur l'emploi dans la Fonction publique, qui est reproduit intégralement à l'annexe C du rapport. Dans les pages qui suivent, nous ferons des observations et des recommandations sur l'activité politique en regard de nos propositions générales relatives à la conduite professionnelle.

La liberté des fonctionnaires de participer à la vie politique est restreinte sous différents rapports, la loi leur interdisant par exemple de chercher à se faire élire à une charge publique, de travailler pour un parti politique et de recueillir des fonds pour un candidat ou un parti politique. De nos jours, ils sont assujettis à beaucoup moins de restrictions que par le

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1 Kenneth Kernaghan, Optimum, "The Ethical Conduct of Canadian Public Servants", vol. 4, nº 3 (1973) p. 13

passé. La documentation sur le sujet expose l'évolution historique des lois pertinentes et leur raison d'être.[2]

Dans les faits, l'article 32 de la Loi sur l'emploi dans la Fonction publique accorde pour ainsi dire tous les droits politiques à environ 90 pour 100 des fonctionnaires. Essentiellement, il interdit aux sous-ministres et aux chefs d'organismes d'exercer des activités politiques et à certains autres employés de poser leur candidature si, de l'avis de la Commission de la Fonction publique, leur efficacité au poste qu'ils occupent risque d'en souffrir.

L'application des dispositions de la Loi relative aux activités politiques ne remporte pas l'adhésion générale en raison de cas difficiles à juger où la Commission de la Fonction publique a refusé un congé à des employés désirant se présenter à des élections. La Loi permet cependant d'éviter de sérieux problèmes d'ordre politique en interdisant aux plus hauts fonctionnaires et aux autres titulaires de charges publiques ayant des fonctions délicates de se livrer à des activités politiques qui pourraient placer leur loyauté dans une situation de conflit, réelle ou apparente.

On suppose que la neutralité politique est une bonne chose en dépit du fait qu'une certaine politisation de la fonction publique est peut-être inévitable. Il convient donc que l'activité politique des fonctionnaires fasse l'objet de certaines restrictions. Tout bien pesé, nous croyons que l'article 32 permet un équilibre acceptable entre la liberté individuelle et la neutralité politique nécessaire de la fonction publique.

Nous recommandons toutefois que l'article 32 soit retranché de la Loi sur l'emploi dans la Fonction publique pour être incorporé au projet de Loi sur l'éthique dans le secteur public. Parallèlement, la responsabilité de son application

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2 Voir J. Patrick Boyer The Legal Framework of Elections in Canada (Butterworths, Toronto, 1981), en particulier le chapitre 16, "Freedom to Participate in the Political Process", section (b) "Political Rights of Civil Servants"; Kenneth Kernaghan "The Political Right and Activities of Canadian Public Servants", Public Administration in Canada, 2e éd. (1971), pp. 382-390; Kenneth Kernaghan, "Politics, Policy and Public Servants: Political Neutrality Revisited", Canadian Public Administration, 19, nº 3 (1976), p. 433; Mitchell Sharp "Neutral Superservants", Options politiques, novembre/décembre 1982; et Edgar Gallant, "Le rôle du fonctionnaire - Condition essentielle au mieux-être canadien", discours prononcé devant l'Institut des affaires publiques, Halifax, octobre 1983.

serait transférée de la Commission de la Fonction publique au Bureau de l'éthique dans le secteur public.

Actuellement, un fonctionnaire qui désire obtenir un congé pour poser sa candidature à titre de représentant d'un parti politique et briguer les suffrages doit demander l'autorisation de la Commission de la Fonction publique. À notre sens, un organisme central est le mieux placé pour prendre ce genre de décision, sur la recommandation du sous-ministre concerné (recommandation qui, bien sûr, n'a pas nécessairement à être suivie). Nous estimons que cette décision ne doit pas incomber uniquement aux sous-ministres. Sous le nouveau régime, nous prévoyons que l'"organisme décisionnel central" sera le Conseiller en éthique au lieu de la Commission de la Fonction publique, ce qui continuera d'assurer un traitement uniforme des demandes dans tout le secteur public.

D'autre part, c'est le Conseil du Trésor plutôt que la Commission de la Fonction publique qui statue présentement sur les demandes des fonctionnaires qui désirent un congé pour exercer des fonctions politiques (par exemple dans le cabinet d'un ministre ou le cabinet du chef de l'Opposition) parce que, conformément aux articles 5 et 7 de la Loi sur l'administration financière, la responsabilité de ces questions lui incombe à titre d'employeur. Nous recommandons que soit confié au conseiller en éthique, dans ce cas aussi, le soin de répondre aux demandes de congé.

Il ne faudrait surtout pas croire que, par cette proposition de changement, nous voulons porter atteinte à la Commission de la Fonction publique ou au Conseil du Trésor. Ces deux organismes s'acquittent d'une tâche difficile et délicate avec beaucoup d'habileté. Néanmoins, il nous paraît souhaitable de confier au Conseiller en éthique la question des activités politiques pour que tout ce qui touche à l'éthique soit centralisé. Nous reconnaissons que l'activité politique peut être considérée soit comme un problème de dotation en personnel (il s'agit alors de réduire au minimum les facteurs politiques dans les nominations et les promotions) ou comme un problème d'éthique. Les deux points de vue sont légitimes, mais nous croyons que la fonction peut être transférée de la Commission de la Fonction publique au Bureau de l'éthique dans le secteur public sans que les ministères ou la Commission cessent de contrôler le régime du mérite et de décourager le favoritisme politique au sein de la fonction publique. Nous prévoyons que, dans la pratique, le Conseiller en éthique et la Commission de la Fonction publique travailleraient en étroite collaboration à cet égard.

Le transfert de l'article 32 peut aussi offrir l'occasion de clarifier certains points imprécis du libellé actuel. Ceux qui, dans l'administration gouvernementale, ont un rôle à jouer dans ce domaine (la Commission de la Fonction publique, le Conseil du Trésor, la Commission des relations de travail dans la Fonction

publique, les sous-ministres, par exemple) pourraient suggérer des éclaircissements ou des améliorations qui seraient incorporés à l'article avant le dépôt au Parlement du projet de loi sur l'éthique dans le secteur public. Toute proposition de changement bien précise devrait évidemment reposer sur des données solides justifiant la nécessité de modifier le libellé actuel de l'article.

b) Critiques publiques

Nous constatons qu'il n'y a pas eu de changement en ce qui concerne la règle traditionnelle voulant que les titulaires non élus de charges publiques ne doivent pas se livrer en public à des critiques de la politique ou de l'administration gouvernementales à moins d'avoir obtenu un congé pour poser leur candidature à des élections. À l'heure actuelle, la Commission de la Fonction publique, habilitée par la loi à s'occuper de certains types d'activités politiques, n'a pas le pouvoir nécessaire pour régler les cas de critiques publiques. Quoique la question relève du Conseil du Trésor, c'est généralement le ministère concerné qui s'occupe du dossier.

La question des critiques publiques risque de poser des problèmes en vertu de la Charte des droits et libertés à moins que les restrictions ne soient énoncées de manière concise. Il faut donc établir une disposition législative précise qui restreigne la liberté d'expression (que la Charte garantit autrement à tous les Canadiens) des titulaires non élus de charges publiques d'une façon raisonnable et nettement justifiable dans le cadre d'une société libre et démocratique. C'est pourquoi nous recommandons que le Code d'éthique prévoie une disposition sur les critiques formulées en public par les titulaires non élus de charges publiques à l'égard de la politique et de l'administration gouvernementales. Après l'adoption de la Loi sur l'éthique dans le secteur public, qui rendrait le code exécutoire, cette disposition aurait force de loi. Nous suggérons un libellé qui pourra sûrement être amélioré suite à des consultations avec les syndicats de la fonction publique et d'un débat au Parlement.

Nous croyons que le Bureau de l'éthique dans le secteur public aura un rôle plus significatif si son mandat l'habilite à conseiller les sous-ministres, les chefs d'organismes, la Commission de la Fonction publique et le Conseil du Trésor dans ce domaine.

Les activités politiques et les critiques publiques des titulaires non élus de charges publiques sont si étroitement liées que plusieurs auteurs considèrent les deux questions essentiellement comme un tout. Au gouvernement fédéral, elles sont traitées distinctement, mais pour une raison bien pratique: une partie des activités politiques est régie par l'article 32 de la Loi sur l'emploi dans la Fonction publique et est du ressort de la

Commission de la Fonction publique, tandis que la responsabilité des critiques publiques et des activités politiques non assujetties à l'article 32 incombe au Conseil du Trésor ou, par délégation de pouvoirs, aux sous-ministres et chefs d'organismes. Même si la ligne de démarcation entre les activités politiques et les critiques publiques est très difficile à tracer en pratique, il a été nécessaire de les dissocier puisque la responsabilité en était partagée. La création du Bureau de l'éthique dans le secteur public se justifie donc d'autant plus par le fait de confier les deux questions au conseiller en éthique qui s'impose comme la solution logique. Cette réorganisation devrait favoriser le traitement plus méthodique des cas de critiques publiques et d'activités politiques.

CHAPITRE 16

RÈGLES RÉGISSANT LES JUGES ET LES ORGANISMES QUASI JUDICIAIRES

a) Introduction

Puisque les juges sont nommés par le gouverneur en conseil, comme la plupart des membres des organismes quasi judiciaires du gouvernement fédéral, ils s'inscrivent dans notre mandat à titre de titulaires à plein temps nommés par le gouverneur en conseil.

Il faut toutefois reconnaître qu'il est important que les juges nommés par le gouvernement fédéral ne soient pas soumis à la stricte application détaillée du régime proposé, afin de préserver l'indépendance de la magistrature. Bien que les membres des organismes quasi judiciaires ne soient pas des juges, aux fins de notre étude leur rôle est décisionnel et adjudicatif. C'est pourquoi il est important, en raison de l'image qu'en a le public, que les organismes quasi judiciaires ne soient pas traités tout simplement comme un autre ministère du gouvernement.

Le présent chapitre passe en revue les dispositions prises récemment à l'égard de la conduite des juges afin de préciser pourquoi aucune modification n'est recommandée. Aux États-Unis, au palier fédéral, les juges ont été assujettis au même régime que les autres services gouvernementaux, même s'ils avaient fortement recommandé le contraire pour des raisons d'indépendance judiciaire et en dépit de l'existence d'un comité d'éthique de la magistrature qui s'occupait de ces questions. La recommandation que nous présentons, après réflexion, ne devrait donc pas être considérée comme allant de soi.

Nous examinons l'expérience récente des juges canadiens au chapitre des dispositions qui ont été prises à l'égard des questions de conduite à cause des parallèles utiles qu'elle nous permet de faire entre le rôle du Conseil canadien de la magistrature et celui du Conseiller en éthique que nous proposons.

Nous examinons ensuite la situation plus complexe des organismes quasi judiciaires et nous formulons des recommandations quant à la façon d'adapter nos propositions générales portant sur un Code d'éthique enchâssé dans une loi, un Bureau de l'éthique dans le secteur public et le rôle des codes complémentaires, afin d'atteindre les mêmes objectifs tout en laissant à ces organismes une plus grande indépendance.

b) Rôle du Conseil canadien de la magistrature

Le Conseil canadien de la magistrature est constitué par l'article 39 de la Loi sur les juges. Il comprend le juge en chef du Canada, ainsi que les juges en chef, les juges en chef associés et les juges en chef adjoints des cours supérieures ou de leurs divisions ou chambres. L'article 45 de la Loi sur la cour canadienne de l'impôt (29-30-31-32 Eliz. II 1980-81-82-83, C. 158) modifie l'article 39 et dispose que sont membres du Conseil le juge principal de la Cour suprême du territoire du Yukon et de la Cour suprême des territoires du Nord-Ouest, les juges en chef et les juges en chef adjoints des cours de comté ou, en l'absence de tels juges en chef ou juges en chef adjoints, des juges nommés par les juges de cette cour pour la représenter au Conseil ainsi que le juge en chef et le juge en chef adjoint de la Cour canadienne de l'impôt. Le Conseil a pour objet de favoriser l'efficacité et l'uniformité dans l'administration de la justice devant les cours supérieures, les cours de comté et la Cour canadienne de l'impôt.

L'article 40 de la Loi sur les juges dispose que le Conseil doit, à la demande du ministre de la Justice du Canada ou du procureur général d'une province, commencer une enquête en vue de savoir si un juge d'une cour supérieure, d'une cour de district, de la Cour canadienne de l'impôt ou d'une cour de comté devrait être révoqué pour l'une ou l'autre de plusieurs raisons, notamment: s'être rendu coupable de mauvaise conduite, n'avoir pas rempli utilement ses fonctions ou s'être mis, par sa conduite ou pour toute autre raison, dans une situation telle qu'il ne peut remplir utilement ses fonctions.

Il y a donc déjà une procédure visant les cas où la conduite d'un juge le place dans une situation telle qu'il ne peut remplir utilement ses fonctions, et le présent rapport s'y intéressera.

Le paragraphe 40 (2) donne au Conseil canadien de la magistrature le pouvoir de procéder à une investigation de toute plainte ou allégation faite relativement à un juge d'une cour supérieure, d'une cour de district, d'une cour de comté ou de la Cour canadienne de l'impôt. Aux fins de mener une enquête demandée par le ministre de la Justice du Canada ou le procureur général d'une province ou d'effectuer une investigation de sa propre initiative, le Conseil canadien de la magistrature peut désigner un ou plusieurs de ses membres pour former un comité d'enquête avec les membres inscrits au barreau d'une province pendant 10 ans au moins, le cas échéant, qui peuvent être désignés par le ministre de la Justice du Canada.

Comité d'enquête pour les juges

Le Conseil canadien de la magistrature, ou un comité d'enquête, qui procède à une enquête ou à une investigation en vertu de l'article 40 est réputé être une cour supérieure et a le pouvoir de citer devant lui tout particulier ou témoin, de l'enjoindre à rendre témoignage et à produire des documents et de contraindre les témoins. Le Conseil peut interdire la publication de tous renseignements ou documents qui lui sont soumis et se rapportent à une enquête ou investigation en vertu de l'article 40 ou en découlent, lorsqu'il est d'avis que cette publication n'est pas dans l'intérêt public. Les enquêtes peuvent être menées en public ou en privé, sauf si le ministre de la Justice exige qu'elles soient menées en public.

Un juge qui fait l'objet d'une enquête ou investigation en vertu de l'article 40 doit recevoir un préavis raisonnable de la question faisant l'objet de l'enquête ou investigation ainsi que de la date et du lieu d'une audition de celle-ci et il doit avoir la possibilité d'y être entendu, de contre-interroger des témoins et de produire des preuves en sa faveur, soit personnellement, soit par procureur.

Lorsqu'une enquête ou investigation en vertu de l'article 40 est terminée, le Conseil doit présenter au ministre de la Justice du Canada un rapport sur ses conclusions et lui communiquer le dossier de l'enquête ou de l'investigation. Lorsque, de l'avis du Conseil, le juge qui a fait l'objet d'une enquête ou investigation est inhabile à remplir utilement ses fonctions pour cause, entre autres, de mauvaise conduite ou de conduite "incompatible", le Conseil peut recommander que le juge soit révoqué et cesse de toucher tout autre traitement. Tout décret du gouverneur en conseil révoquant un juge et tous les rapports et témoignages y afférents doivent être soumis au Parlement dans les quinze jours qui suivent la date à laquelle ce décret est rendu ou, si le Parlement ne siège pas à ce moment-là, l'un des quinze premiers jours où il siège par la suite, selon les dispositions du paragraphe 41 (7) de la Loi sur les juges.

Enquête sur la conduite d'autres titulaires de charges publiques

Il est important de signaler que l'article 42 de la Loi sur les juges autorise le Conseil canadien de la magistrature à faire d'autres enquêtes. Cela est extrêmement pertinent à notre examen, car ce pouvoir pourrait suppléer, pour certains types d'enquête, celui dont bénéficierait, à sa demande, le Conseiller en éthique.

À la demande du ministre de la Justice du Canada, en vertu de l'article 40, le Conseil doit procéder à une enquête sur

le point de savoir si une personne nommée en vertu d'une loi du Parlement pour occuper un poste à titre amovible (à l'exception d'un juge des cours supérieures ou de comté ou de la Cour canadienne de l'impôt, et des personnes visées par l'article 19 de la Loi sur la Chambre des communes, soit un greffier, officier, messager ou autre serviteur de la Chambre des communes, s'il est nommé par la Couronne) doit être révoquée de son poste pour les motifs énoncés au paragraphe 41 (2). Ces motifs comprennent notamment la mauvaise conduite ou le fait de se placer, en raison de sa conduite ou autrement, dans une situation telle que le titulaire ne puisse remplir utilement ses fonctions. Les procédures relatives aux enquêtes en vertu des articles 40 et 41, résumés ci-dessus, s'appliquent également, mutatis mutandis, aux enquêtes entreprises sous le régime de l'article 42.

Dans le cas d'une telle enquête, le paragraphe 42 (3) dispose que le gouverneur en conseil peut, sur recommandation du ministre de la Justice du Canada, après réception du rapport du Conseil canadien de la magistrature relativement à l'enquête à l'égard d'une personne qui peut être révoquée par le gouverneur en conseil, autrement que par une requête du Sénat ou de la Chambre des communes ou par une requête commune, révoquer la personne par décret. Le décret de révocation, ainsi que les rapports et les éléments de preuve qui s'y rapportent doivent être déposés au Parlement dans les quinze jours qui suivent le décret ou dans les quinze jours de la séance suivante.

Enfin, à l'égard d'enquêtes et d'investigations quant à la révocation d'un juge ou d'une autre personne nommée en vertu d'une loi du Parlement pour occuper un poste à titre amovible, conformément aux articles 40, 41 et 42 de la Loi sur les juges, l'article 43 précise que les autres pouvoirs, droits et fonctions de la Chambre des communes, du Sénat ou du gouverneur en conseil en matière de révocation d'une personne, notamment d'un juge, consécutive à une enquête menée en vertu de ces articles, ne sont pas modifiés par les articles 41 et 42.

Ainsi, l'article 42 de la Loi sur les juges prévoit une procédure permettant de faire enquête sur les plaintes à l'égard de la conduite de personnes détenant des charges quasi judiciaires (et de certaines autres personnes), dans la mesure où ces titulaires de charges publiques sont nommés à titre amovible par le gouverneur en conseil en fonction d'une loi.

c) Règles actuelles régissant la conduite des juges

Dispositions législatives régissant les conflits d'intérêts

L'article 36 de la Loi sur les juges enchâsse le principe que les juges doivent s'occuper de leurs fonctions judiciaires et de rien d'autre. L'article 36 interdit à un juge

d'être, directement ou indirectement, administrateur ou directeur d'une corporation, société ou firme ou de se livrer à une profession ou à un commerce, pour lui-même ou pour d'autres, autre que ses fonctions judiciaires.

De même l'article 37 dispose qu'aucun juge ne doit agir comme commissaire, arbitre, adjudicateur, conciliateur ou médiateur pour une commission, une enquête ou toute autre procédure. Les exceptions précises à ces règles portent sur les juges de l'amirauté, les juges qui agissent comme commissaires ou arbitres dans des affaires qui leur sont renvoyées par le Parlement ou sous son autorité, ou pour évaluer l'indemnité ou les dommages en vertu de la Loi sur les chemins de fer ou de toute autre loi d'intérêt public.

Au Québec, le Code de procédure civile contient également des dispositions législatives régissant les cas où un juge doit se récuser.

Une forme de "code complémentaire"

Outre les dispositions législatives visant la conduite des juges, il existe une sorte de "code complémentaire". En effet, deux livres à l'intention des juges ont été écrits à la demande du Conseil canadien de la magistrature: un livre pour les juges francophones, publié en 1980 sous le titre Le Livre du Magistrat, écrit par Gérald Fauteux, et un livre pour les juges anglophones, intitulé A Book for Judges, écrit par J.O. Wilson.

Le Conseil canadien de la magistrature a fait rédiger ces livres parce qu'il croyait qu'une présentation systématique des problèmes juridiques et éthiques auxquels font face les juges, particulièrement ceux qui viennent d'être nommés, dans l'administration de la charge judiciaire, les aiderait à exercer leurs fonctions. Les livres suggèrent des solutions à ces problèmes, certaines provenant d'une loi, d'autres étant plutôt des conseils. Les deux livres traitent de la conduite qui convient aux membres de la magistrature.

Code tacite concernant la conduite des juges

Les juges ne participent pas au processus politique ni à l'administration publique. On considère en général que leur nomination, qui les isole complètement des questions qui préoccupent les ministres et les fonctionnaires, constitue une garantie de leur aptitude à exercer une charge indépendante des ordres de l'exécutif. En outre, les juges n'établissent pas leur propre ordre du jour, ni les questions qu'ils étudieront, ni avec qui. Ils sont donc dans une situation complètement différente de celle des ministres et de leurs subordonnés dans l'administration publique. Les juges n'administrent pas un ministère, ils ne dépensent pas les deniers publics, ne dotent pas de poste et ne

s'occupent pas des relations, commerciales ou autres, avec des organismes privés.

Les juges doivent se comporter de façon impartiale et désintéressée. Au moment de leur nomination, ils doivent rompre leurs liens commerciaux directs ou indirects. S'ils détiennent des actions dans une société impliquée dans un litige, ils en avertissent le juge en chef, nous dit-on, et ils peuvent eux-mêmes se récuser ou laisser le juge en chef décider. Certains juges choisissent de se récuser, dès qu'ils ont un quelconque intérêt financier dans ladite société. Dans la province de Québec, ces questions ne sont pas laissées simplement à l'usage, comme c'est le cas dans les provinces de "common law" et à la Cour suprême du Canada, mais font l'objet de l'article 234 et des articles suivants du Code de procédure civile du Québec.

La question de l'intérêt financier dans les litiges en instance n'est qu'un aspect mineur du devoir d'objectivité des juges, dont les ramifications ne sauraient se traiter convenablement dans des lignes directrices détaillées sur les conflits d'intérêts. Dans l'exercice de ses fonctions, le juge doit mettre de côté des opinions politiques et sociales qui peuvent être le produit d'années de pratique privée ou d'expérience. D'autres questions, comme celles de l'ancien associé qui agit comme avocat ou de la participation d'un ancien client ou d'un membre de la famille du juge dans un litige, semblent en général avoir été réglées avec succès et discrétion au cours des années et sans qu'il soit nécessaire d'avertir ou de prévenir le juge au moyen d'une directive écrite.

Compte tenu des dispositions de la Loi sur les juges, de l'existence et du fonctionnement du Conseil canadien de la magistrature ainsi que des conseils formulés dans les deux livres traitant des questions de conduite, compte tenu aussi de l'importance de l'indépendance de la magistrature, de même que du fait que les juges doivent se consacrer exclusivement à leurs fonctions officielles et que le Conseil canadien de la magistrature est autorisé à s'occuper de toutes les allégations et même des soupçons de mauvaise conduite de la part des juges, nous croyons qu'il ne faut nullement assujettir les juges aux règles sur les conflits d'intérêts que le gouvernement promulgue à l'intention des fonctionnaires, des employés des organismes et des administrations et des ministres de la Couronne.

Même si des lignes directrices sont indiquées pour les agents de l'exécutif, il serait particulièrement difficile de rédiger un code de règles précises qui puisse remplacer les traditions et la jurisprudence auxquelles s'en remettent présentement les juges en cas de difficulté; et toute tentative de codification législative (à part les principes généraux énoncés au Code d'éthique que nous proposons) courrait le grave risque de substituer de nouvelles règles aux principes établis de justice

naturelle concernant le "préjugé" et le "préjugé éventuel", par rapport auxquels il faut continuer à régler les nouveaux problèmes afin de maintenir à leur niveau actuel les normes de justice.

d) Situation des organismes quasi judiciaires

Lorsque vous avez présenté les lignes directrices sur les conflits d'intérêts à la Chambre des communes le 18 décembre 1973, Monsieur le Premier ministre, vous avez traité de la situation des titulaires de charges quasi judiciaires;

> Nous comptons appliquer les mêmes lignes directrices générales aux personnes nommées au sein de conseils, d'organismes et de tribunaux judiciaires ou quasi judiciaires. Certains problèmes d'ordre juridique se posent toutefois dans ce cas. J'ai demandé au ministre de la Justice (M. Lang) d'étudier la question et de proposer éventuellement les modifications à apporter à la loi actuelle de façon à en assurer la compatibilité avec les normes de conduite établies.

Même s'il y avait alors une intention d'appliquer un régime quelconque à ce groupe, il a par la suite été précisé que les juges ne seraient pas inclus et que les dispositions de la Loi sur les juges, dont nous avons parlé ci-dessus, régiraient cette situation. Il restait les commissions, offices et tribunaux quasi judiciaires.

Pour comprendre la démarche que nous recommandons, il est essentiel de retracer l'histoire récente des difficultés que l'on a rencontrées jusqu'ici lorsqu'on a tenté d'élaborer des règles appropriées sur les conflits d'intérêts pour les organismes quasi judiciaires.

Qui appartient à la catégorie quasi judiciaire ?

Au cours de la décennie qui a suivi vos propos à la Chambre des communes, Monsieur le Premier ministre, un certain nombre d'efforts ont été faits pour concevoir une façon appropriée d'aborder des lignes directrices à l'intention des organismes quasi judiciaires. La définition des organismes "quasi judiciaires" à cet effet n'était pas le moindre des problèmes.

La distinction entre les décisions "administratives" et les décisions "judiciaires" et "quasi judiciaires" semble traduire en grande partie le souci des tribunaux de dégager le rôle qui leur convienne dans l'examen des actes des autorités administratives. Les tribunaux sont conscients du fait que toutes les décisions ne peuvent être prises d'après des preuves officielles et que certaines décisions doivent se prendre en fonction de considérations de politique qui transcendent les préoccupations individuelles de ceux qui, d'une façon ou d'une autre, sont

touchés par ces décisions. Ils reconnaissent également que, dans le cas des décisions à caractère administratif, il vaut mieux que les tribunaux usent de modération et s'en remettent au mécanisme non judiciaire prévu par le Parlement. C'est pourquoi de nombreux tribunaux, offices et commissions du gouvernement fédéral ont été appelés "quasi judiciaires".

On a proposé deux règles pratiques pour déterminer si un organisme est quasi judiciaire ou non: 1) dégager les fonctions premières ou principales conférées par la législation à cet organisme et 2) décider si ces fonctions premières ou principales exigent que l'organisme ou le titulaire détermine par règle ou par décision, les droits et les obligations de particuliers. D'après ce principe, on a déjà dressé une liste d'environ 36 organismes du gouvernement fédéral, liste qui comprenait notamment la Commission de contrôle de l'énergie atomique, la Commission d'appel du droit d'auteur, la Commission des réclamations pour dommages nucléaires, la Commission sur les pratiques restrictives du commerce du Canada et la Commission du tarif.

Points ou principes généraux pour l'élaboration de règles de conduite

Au cours de nos discussions, les points ou principes suivants ont semblé pertinents à l'éboration de lignes directrices pour les organismes quasi judiciaires.

1) Depuis longtemps, on s'attend à ce que les titulaires de charges quasi judiciaires observent les plus hautes normes d'indépendance et d'impartialité dans l'exercice des fonctions judiciaires de leurs charges.

2) Bon nombre des titulaires de charges publiques qui font l'objet de notre étude sont nommés à titre amovible sous l'empire de la loi en cause; c'est pourquoi on peut douter que des lignes directrices régissant leur conduite promulguées par le gouverneur en conseil aient un effet légal en l'absence de législation par le Parlement.

3) Les règles de conduite ne s'appliqueront qu'aux fonctions judiciaires exercées par les titulaires des charges en cause; à l'égard des autres fonctions, les lignes directrices touchant les personnes nommées par le gouverneur en conseil et les fonctionnaires s'appliquent déjà.

4) Dans la mesure où les règles de droit relatives aux conflits d'intérêts et aux préjugés, qui s'appliquent présentement aux titulaires de charges judiciaires, viseraient les titulaires de charges quasi judiciaires à l'égard de leurs fonctions judiciaires, il pourrait être

possible d'éviter la stricte application de ces règles si le titulaire divulguait aux parties en cause dans toute affaire dont il serait saisi les faits qui donneraient d'ordinaire lieu à un conflit d'intérêts, dans l'hypothèse évidemment que toutes les parties acceptent qu'il continue d'agir dans cette affaire.

5) Il y a un certain risque qu'il faut assumer si l'on applique des lignes directrices, même du genre dont nous avons parlé ci-dessus, à des charges quasi judiciaires établies par une loi. Il se pourrait que le titulaire d'une telle charge soit par là exposé à se récuser dans une affaire donnée lorsque la loi fixe un quorum pour le tribunal dont il est membre; le tribunal pourrait en conséquence se trouver incapable d'entendre l'affaire.

Les propositions à l'étude à l'égard de règles de conduite touchant les organismes quasi judiciaires comprennent quatre éléments principaux où le titulaire d'une charge quasi judiciaire doit 1) respecter, dans l'exercice de ses fonctions judiciaires, les mêmes règles à l'égard des conflits d'intérêts que le titulaire de charge judiciaire; 2) apporter aux affaires dont il est saisi à titre judiciaire un esprit libre, indépendant et impartial; 3) éviter tout lien d'affaire ou personnel qui pourrait compromettre ou préjuger l'indépendance du poste et 4) limiter ses placements personnels à ceux qui ne sauraient donner lieu à un parti pris.

En 1978, on tentait de nouveau au gouvernement d'élaborer des lignes directrices à l'intention des organismes quasi judiciaires; cependant, les dispositions essentielles demeuraient inchangées par rapport aux versions antérieures. Cependant, à cette époque, on jugeait que seulement 14 organismes du gouvernement fédéral pouvaient être appelés "quasi judiciaires" et donc être assujettis à ces lignes directrices. Il s'agissait du Tribunal antidumping, de la Commission de contrôle de l'énergie atomique, du Conseil de la radiodiffusion et des télécommunications canadiennes, du Conseil canadien des relations de travail, de la Commission d'examen établie par la Loi sur l'arpentage des terres du Canada, de l'Office national de l'énergie, de la Commission canadienne des transports, de la Commission des relations de travail dans la Fonction publique, de la Commission de l'assurance-chômage, de l'Office de répartition des approvisionnements d'énergie, de l'Administrateur en vertu de la Loi anti-inflation, de la Commission sur les pratiques restrictives du commerce du Canada, de la Commission canadienne des droits de la personne et de la Commission du tarif.

On n'a cependant jamais donné suite au projet de révision des lignes directrices de 1978, puisqu'on continuait à s'inquiéter du principe de l'application des lignes directrices à un organisme quasi judiciaire. Essentiellement, il s'agissait de

savoir s'il convenait, dans notre régime parlementaire, que le Cabinet "s'immisce" dans les affaires des organismes quasi judiciaires ou "semble les influencer".

Bien qu'aucune décision officielle n'ait été prise d'abondonner le dossier des lignes directrices touchant les organismes quasi judiciaires, les priorités ont commencé à se modifier à la fin des années 1970 et la question est demeurée dans l'ombre. Elle ressurgit maintenant car nous devons en tenir compte en recommandant des façons d'aborder l'éthique dans le secteur public.

Ce bref historique montre l'inquiétude profonde qu'a suscitée par le passé l'application de méthodes ou de lignes directrices générales aux organismes quasi judiciaires, et qui nous amène à recommander une autre démarche: l'élaboration d'un "code complémentaire" adapté expressément à chaque organisme judiciaire, qui ferait partie de la loi constituante de cet organisme.

Avant d'étudier comment cette proposition fonctionnerait, nous désirons terminer ce bref survol des événements de la dernière décennie en citant, Monsieur le Premier ministre, une déclaration que vous avez faite à la Chambre des communes au milieu de 1978 en réponse à une question:

> "les lignes directrices que nous avons publiées (en 1973) ne s'appliquaient pas aux agents judiciaires ou quasi judiciaires"... Nous avons songé aux titulaires de fonctions judiciaires ou quasi judiciaires, mais nous avons pensé alors qu'il ne convenait pas de publier de lignes directrices les concernant sans discussions approfondies avec les tribunaux, et la Chambre comprendra, je crois, que le gouvernement ait pu hésiter quelque peu à laisser passer du secteur exécutif ou législatif au secteur judiciaire. C'est pourquoi nous n'avons pas publié de lignes directrices à cet égard... Si la Chambre veut d'une façon ou d'une autre que le gouvernement publie des principes directeurs pour ce secteur, nous étudierons la question... Le gouvernement est prêt à aller de l'avant dans ce domaine. En fait, nous avons examiné cette question avant de publier des directives, mais nous avons pensé qu'il était plus compatible avec la division des pouvoirs et la non-ingérence de l'exécutif dans les affaires quasi-judiciaires de ne pas publier de directives."

On ne saurait nier que l'élaboration de règles d'éthique pour les organismes quasi judiciaires demeure préoccupante. Certains ministres, par exemple, ont demandé au cours des dernières années que les lignes directrices actuelles soient

appliquées à certaines entités quasi judiciaires. C'est ainsi qu'elles en sont venues à s'appliquer, par exemple, aux membres à plein temps de la Commission nationale des libérations conditionnelles, de la Commission sur les pratiques restrictives du commerce, de la Commission de contrôle de l'énergie atomique et du Commissaire des brevets.

D'autres organismes quasi judiciaires ont élaboré des lignes directrices de leur propre chef; c'est ainsi qu'ont été élaborées en 1979 les lignes directrices sur les conflits d'intérêts à l'intention des juges de la citoyenneté. On a pu constater par la suite la valeur de cet exercice. Le ministre responsable des juges de la citoyenneté avait été informé d'un problème de conduite qui exigeait des sanctions disciplinaires; il a été très soulagé d'apprendre que les juges de la citoyenneté avaient déjà, de leur propre chef, mis en place un ensemble de lignes directrices qui pouvaient servir dans cette affaire.

Si l'on considère la chose d'un autre angle, il est également vrai que des lignes directrices à l'intention des organismes quasi judiciaires peuvent fournir des réponses et une orientation aux personnes qui se trouvent dans une situation de conflit éventuel et leur accorder la même protection qu'aux autres personnes nommées par le gouverneur en conseil. Bref, il y a des cas où de telles règles seraient les bienvenues et ce fait nous est apparu clairement lors de nos consultations.

Nous proposons donc d'élaborer avec soin des règles et des procédures complémentaires pour aider à éviter les conflits d'intérêts et pour permettre aux personnes en cause de se conformer au Code d'éthique. Ces règles et procédures complémentaires doivent être adaptées aux exigences de chaque organisme quasi judiciaire. Nous suggérons que les règles de procédure pour éviter les conflits d'intérêts (mentionnées au chapitre 12) servent de modèle dans l'élaboration de telles règles. Les dispositions jugées appropriées pour l'organisme quasi judiciaire en question peuvent être adoptées ou modifiées au besoin.

Ces règles complémentaires pour tous les organismes quasi judiciaires seraient ensuite réunies et figureraient dans une clause omnibus de modification de la Loi sur l'éthique dans le secteur public, permettant de modifier chaque loi pertinente (la Loi sur la radiodiffusion, la Loi antidumping, la Loi relative aux enquêtes sur les coalitions, et ainsi de suite) et d'ajouter ces dispositions à la loi constituante de chaque organisme quasi judiciaire.

Ainsi, ces règles et procédures seraient édictées par le Parlement comme étant des attributs de l'organisme quasi judiciaire, au même titre que certains autres attributs figurant dans sa loi constituante.

Parce que ces règles de procédure auraient été élaborées en collaboration avec l'organisme quasi judiciaire, parce qu'il ne s'agirait pas de procédures générales mais qu'elles seraient adaptées aux besoins particuliers de l'organisme quasi judiciaire, parce qu'elles seraient adoptées par le Parlement et qu'elles feraient partie du cadre légal de fonctionnement de l'organisme quasi judiciaire en question, elles ne sauraient être considérées comme étant une ingérence du gouvernement dans les affaires d'un organisme de type judiciaire.

Le lecteur se rendra compte que notre démarche à l'égard des organismes quasi judiciaires s'apparente à celle que nous adoptons à l'égard des sociétés de la Couronne, où la question de l'autonomie entre également en jeu (bien que pour des raisons tout à fait différentes). La solution que nous proposons dans les deux cas est d'élaborer des procédures et des codes complémentaires expressément adaptés qui, dans le cas des sociétés de la Couronne, peuvent être adoptés à titre de règlement sous l'empire de la loi constituante.

Cette démarche nous a été inspirée par le fait qu'elle a déjà été tentée, d'une façon restreinte, dans plusieurs lois régissant des organismes quasi judiciaires. Par exemple, la Loi sur l'Office national de l'énergie, qui crée l'Office national de l'énergie comprenant 11 membres nommés par le gouverneur en conseil, dispose à l'article 3 que:

> Une personne ne peut être nommée ni demeurer membre de l'Office si elle n'est pas un citoyen canadien ou si, en qualité de propriétaire, actionnaire, administrateur, fonctionnaire, associé ou d'autre façon, elle se livre à l'entreprise de production, vente, achat, transmission, exportation ou importation d'hydrocarbures ou de force motrice, ou si elle en pratique autrement le commerce, ou si elle détient quelque obligation, <u>debenture</u> ou autre titre d'une compagnie.

De même, la Loi antidumping, la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes et la Loi nationale sur les transports contiennent des dispositions claires sur les conflits d'intérêts. Au contraire, la Loi sur le contrôle de l'énergie atomique et la Loi relative aux enquêtes sur les coalitions ne contiennent aucune disposition semblable à celle de l'Office national de l'énergie.

On peut presque dire la même chose de la Loi sur la Commission du tarif, bien que deux dispositions portent partiellement sur des considérations de conflits. Il s'agit du paragraphe 3 (7), qui dispose que nul membre de la Commission du tarif n'est éligible à une élection à la Chambre des communes du Canada avant l'expiration de deux ans à compter de la date à laquelle il a cessé d'être membre de la Commission et du paragraphe 5 (10) qui

stipule que, si des témoignages ou des renseignements d'une nature confidentielle, relativement aux affaires ou opérations de quelque personne, firme ou corporation, sont donnés ou recueillis au cours d'une enquête, ces témoignages ou renseignements ne doivent pas être rendus publics de manière qu'ils puissent servir à un commerçant concurrent ou rival de la personne, firme ou corporation, respectivement.

Dans le cas du Tribunal antidumping, le paragraphe 21(7) de la Loi antidumping dispose qu'un membre "doit consacrer tout son temps à l'exercice de ses fonctions en vertu de la présente loi et ne doit accepter ni occuper aucun poste ou emploi incompatible avec ses attributions en vertu de la présente loi."

Quant au Conseil de la radiodiffusion et des télécommunications canadiennes, l'article 4 dispose qu'un membre à plein temps "consacre tout son temps à l'exécution des fonctions qui lui sont assignées en vertu de la présente Partie", alors que l'article 5 traite des intérêts extérieurs dans les termes suivants:

> (1) Nul ne peut être nommé membre du Conseil et continuer à occuper cette charge s'il n'est pas citoyen canadien ou ne réside pas habituellement au Canada ou si, directement ou indirectement, en qualité de propriétaire, d'actionnaire, d'administrateur, de dirigeant, d'associé ou de toute autre façon,
>
> (a) il exploite une entreprise de télécommunications; ou
> (b) il possède quelque intérêt pécuniaire ou intérêt de propriétaire
>
> (i) dans une entreprise de télécommunications, ou
> (ii) dans la fabrication ou la distribution d'appareils de télécommunications, sauf lorsque cette distribution n'est qu'incidente au commerce de gros ou de détail de marchandises en tous genres.
>
> (2) Lorsqu'un intérêt interdit par le paragraphe (1) échoit à un membre, à titre personnel, par testament ou par succession ab intestat, ce membre doit s'en départir définitivement dans les trois mois qui suivent.

Enfin, la Loi nationale sur les transports, aux articles 8 et 9, traite des conflits d'intérêts en ces termes:

> 8. Si quelque commissaire est intéressé dans une affaire portée devant la Commission ou a des liens de parenté ou d'affinité avec un intéressé, le gouverneur en conseil peut, soit à la demande de ce commissaire, soit autrement, nommer quelque personne désintéressée

pour agir en qualité de commissaire pro hac vice; et en cas de maladie, d'absence ou d'inhabilité à agir de l'un des commissaires, le gouverneur en conseil peut aussi nommer un commissaire pro hac vice. Toutefois, aucun commissaire n'est rendu incapable d'agir par raison d'intérêt ou de lien de parenté ou d'affinité avec quelque personne intéressée dans une affaire portée devant la Commission.

9. (1) Aucun membre ou fonctionnaire de la Commission ne doit, directement ou indirectement,

(a) détenir aucun intérêt dans une compagnie de chemins de fer, une compagnie de transport aérien, une compagnie de pipeline pour denrées, une compagnie de navigation ou une entreprise de transport par véhicule à moteur, ou dans quelque entreprise de l'une des compagnies susdites, ni détenir aucun intérêt dans les obligations d'une telle compagnie ou entreprise;

(b) ni entreprendre la fabrication ou la vente d'aéronefs, de navires, de matériel roulant de chemin de fer, de camions, de remorques ou d'autobus, ou de matériel de pipeline, ni entreprendre le transport des marchandises ou de voyageurs par tout moyen de transport moyennant un prix de louage ou une rétribution; ni

(c) détenir aucun intérêt dans un appareil, une machine, un procédé ou un article breveté ou une partie quelconque de ceux-ci qui peut être nécessaire ou utilisée comme partie du matériel roulant ou autre matériel d'un chemin de fer, du matériel d'un aéronef, d'un navire, d'une pipeline, d'un camion, d'une remorque ou d'un autobus ou de tout ouvrage ou toute entreprise assujettie à la présente loi, à la Loi sur les chemins de fer, à la Loi sur l'aéronautique, ou à la Loi sur le transport par véhicule à moteur.

(2) Lorsque tout intérêt prohibé en vertu du paragraphe (1) est dévolu à un membre ou à un fonctionnaire de la Commission, par testament ou succession, pour son propre profit, il est absolument tenu de céder cet intérêt dans les trois mois de la dévolution.

Nous recommandons donc cette démarche. Si elle est acceptée, il y aurait un travail précis à accomplir. Il faudrait, en premier lieu, identifier (aux fins de les soustraire à l'application des règles de procédure visant à éviter les conflits d'intérêts) les organismes jugés "quasi judiciaires". Ensuite, il

faudrait déterminer avec chaque organisme quasi judiciaire les règles qui doivent être incluses dans la loi constituante de cet organisme. En troisième lieu, il faudrait regrouper ces règles pour chaque organisme sous forme de modification à leurs lois respectives, de sorte qu'elles puissent être incorporées, comme nous le recommandons, dans une seule clause omnibus de la Loi sur l'éthique dans le secteur public.

CHAPITRE 17

RÈGLES D'ÉTHIQUE POUR LES SOCIÉTÉS DE LA COURONNE

a) Autonomie des sociétés de la Couronne

On s'intéresse depuis longtemps au palier fédéral au statut et au rôle des sociétés de la Couronne. Quant à nous, il nous faut trouver le point qui convient pour établir à l'intention de ceux qui dirigent les sociétés et qui y travaillent un régime d'éthique. Selon nous, un ensemble de règles d'éthique est à la fois nécessaire et souhaitable pour les sociétés de la Couronne et l'on ne doit tenir compte de leur autonomie que dans la façon d'élaborer ces règles. Les moyens de régler les conflits d'intérêts semblent aussi variés que les sociétés de la Couronne elles-mêmes.

À notre avis, le public perçoit les sociétés de la Couronne comme faisant partie du gouvernement. Quel que soit le degré d'autonomie de certaines sociétés, le public canadien continue de ne voir dans Air Canada, les Chemins de fer nationaux du Canada, la Société Radio Canada, la Commission d'énergie du Nord canadien, le Conseil des sciences du Canada ou la Société canadienne d'hypothèques et de logement que des facettes différentes du gouvernement fédéral.

b) Classification des sociétés de la Couronne

L'article 66 de la Loi sur l'administration financière définit une société ou corporation de la Couronne comme une "corporation qui, en dernier lieu, doit rendre compte au Parlement, par l'intermédiaire d'un ministre, de la conduite de ses affaires, et comprend les corporations nommées aux annexes B, C et D";

En 1977, le Secrétariat du Conseil du Trésor publiait une liste des sociétés appartenant au gouvernement et contrôlées par lui; cette liste comprenait 14 sociétés de département, appellation qui regroupe des conseils consultatifs et des conseils de subvention comme le Conseil des recherches en sciences médicales du Canada, des organismes de régie comme la Commission de contrôle de l'énergie atomique et un certain nombre d'organismes qui font partie de ministères, comme le Directeur des terres distinées aux anciens combattants; 19 sociétés de mandataire, comprenant des agences de commercialisation comme l'Office canadien du poisson salé, un certain nombre de sociétés qui font des affaires pour le gouvernement comme Construction de défense

(1951) Limitée et certaines sociétés qui fonctionnent dans un marché plus large comme Énergie atomique du Canada Limitée; 21 sociétés de propriétaires, se livrant à des opérations commerciales, comme Air Canada et Via Rail, ainsi que des entreprises de caution et d'assurance comme la Société pour l'expansion des exportations et la Société du crédit agricole; 27 autres sociétés gouvernementales, allant de la Banque du Canada à la Société De Havilland, qui semblent avoir peu de caractéristiques en commun si ce n'est le fait d'avoir été achetées, créées ou d'être parrainées par le gouvernement fédéral; 24 sociétés d'entreprise mixte allant de la Corporation de développement du Canada à l'Administration du pont Blue Water, qui sont des sociétés par actions appartenant conjointement au gouvernement fédéral et à d'autres gouvernements, organismes ou particuliers ou placées sous leur contrôle; un certain nombre de filiales, qui sont des sociétés par action appartenant majoritairement à la Couronne ou à d'autres sociétés du gouvernement ou placées sous leur contrôle; certaines sociétés associées dont le gouvernement détient un intérêt minoritaire soit directement soit par l'entremise d'une autre société, comme Polysar Ltée et la Société des pétroles de l'Arctique Ltée et, finalement, 18 organismes appelés "autres entités et associés" qui comprennent toute une variété de sociétés quasi publiques, dont bon nombre sont des organismes sans but lucratif comme l'Institut Vanier de la famille et l'Institut de recherche en génie forestier du Canada.

En 1979, la Commission royale d'enquête sur la gestion financière et l'imputabilité soulignait que les fonctions des organismes de la Couronne posent deux problèmes principaux, le premier étant l'identification et la classification des organismes de la Couronne, le deuxième portant sur le besoin de normaliser leur automonie vis-à-vis du gouvernement et du Parlement. Elle formulait des critères permettant de distinguer les organismes de la Couronne des ministères ou des organismes du secteur privé, notamment la nature des tâches, la propriété, la source des fonds, les types d'organisation, la délégation et l'autonomie. Cependant, l'expérience a montré qu'il est difficile de classer les sociétés de la Couronne. D'ailleurs, cela n'est probablement pas une nécessité ici. Quelle que soit la nature de la société, l'importance de l'éthique chez son personnel est manifeste.

c) Éthique dans les sociétés de la Couronne

Nous donnerons d'abord un aperçu des activités entreprises ces dernières années à l'égard des sociétés de la Couronne et des questions d'éthique professionnelle, puis nous présenterons des recommandations compatibles avec les autres mesures présentement élaborées en vue de restructurer le rôle des sociétés de la Couronne et leurs rapports avec le gouvernement, quelle que soit la forme définitive de ces rapports.

En 1977, le Bureau du Conseil privé publiait un document dans lequel il présentait les proprositions du gouvernement à l'égard des sociétés de la Couronne. Ce document mettait en doute la conception traditionnelle voulant que le gouvernement et le Parlement interviennent d'assez loin dans les activités des sociétés d'État, de crainte de nuire à leur rendement commercial. Toutes les sociétés de la Couronne, sans exception, ont été mises sur pied par le gouvernement afin de réaliser les objectifs généraux de sa politique. Ainsi, les sociétés commerciales devraient tenter, le plus possible, de réaliser ces objectifs en tenant compte des impératifs commerciaux, mais jamais a-t-on voulu que les objectifs commerciaux l'emportent sur ceux de nature sociale, culturelle ou économique, qui, d'ailleurs, ne sauraient dans nombre de cas se justifier pour des motifs purement commerciaux. Ces objectifs globaux viennent se greffer aux objectifs économiques des sociétés.

Le gouvernement proposait que les administrateurs et les dirigeants des sociétés de la Couronne soient régis par les dispositions de la Loi sur les corporations commerciales canadiennes relatives aux devoirs et responsabitilités des administrateurs à des fins d'uniformité et pour assurer aux administrateurs des sociétés de la Couronne des normes d'éthique claires d'après lesquelles ils pourraient être jugés. En même temps, on croyait que cela aiderait à uniformiser les lois canadiennes sur les sociétés. Cette loi prévoit deux sortes de devoirs pour les administrateurs et les dirigeants: un devoir fiduciaire et un devoir de soins. Le premier est le devoir d'agir de bonne foi et s'applique à l'exercice du pouvoir et à l'utilisation des connaissances acquises à titre officiel. La loi interdit à un administrateur d'utiliser ce pouvoir et ces connaissances pour son propre avantage ou pour l'avantage de quelqu'un qui est en concurrence avec la société. Elle exige que les dirigeants et les administrateurs des sociétés de la Couronne déclarent par écrit à la société tout intérêt important qu'ils peuvent détenir à l'égard d'un contrat passé avec la société et interdit également, dans la plupart des cas, aux administrateurs de voter à l'égard de tels contrats. Les administrateurs à temps partiel et certains dirigeants devraient également déclarer les noms des sociétés privées dont ils sont administrateurs, et administrateurs à temps plein et certains dirigeants ne devraient accepter de poste d'administrateur dans d'autres sociétés sans l'approbation expresse du gouverneur en conseil.

Les autres aspects du régime proposé en matière de conflits d'intérêts demeureraient officieux; toutefois le "pouvoir d'orientation" proposé pourrait servir à leur donner effet. En outre, les personnes nommées par le gouverneur en conseil à des postes à temps plein de sociétés de la Couronne seraient soumises aux mêmes exigences que les sous-ministres.

Il était également proposé de demander aux sociétés de la Couronne d'adopter pour leurs employés des lignes directrices semblables à celles qui touchent les fonctionnaires, notamment à l'égard des activités commerciales ultérieures à l'emploi au gouvernement. La législation proposée comprenait de nombreuses dispositions sur les conflits d'intérêts à l'intention des dirigeants et des administrateurs. Elle recommandait par exemple que le titulaire d'un poste à temps plein dans une société de la Couronne ne puisse accepter un poste d'administrateur dans une société du secteur privé, qu'il doive déclarer ce poste au ministre approprié dans un délai donné et doive démissionner de ce poste d'administrateur s'il continuait à détenir un poste à plein temps. Il aurait cependant été possible d'accepter ou de détenir un poste d'administrateur dans une société du secteur privé avec le consentement du gouverneur en conseil.

La législation proposée précisait un certain nombre de détails quant à l'acceptation de postes à temps plein, de postes à temps partiel et de postes d'administrateur auprès de sociétés du secteur privé, et formulait des règles à l'intention des dirigeants ou des administrateurs détenant un intérêt important dans un contrat ou une affaire proposée avec la société de la Couronne; ces règles auraient exigé la déclaration écrite de l'intérêt.

En 1979, la Commission royale d'enquête sur la gestion financière et l'imputabilité (Commission Lambert) déclarait qu'il fallait que les conseils d'administration des sociétés de la Couronne élaborent des codes à jour portant sur les versements, l'enregistrement des transactions, des contributions, des cadeaux et des services gratuits, l'utilisation et le contrôle de mandataires, y compris l'autorisation de faire des versements aux mandataires, ainsi que l'observation des lois d'autres pays.

Le rapport Lambert suggérait que chaque société établisse son propre code en fonction de ses besoins, et que ces codes comportent des dispositions assurant la vérification et l'observation. Le ministre responsable devait recevoir un exemplaire du code et, si celui-ci n'était pas conforme à la politique gouvernementale, il devait pouvoir demander qu'on y apporte des changements. Une fois que le conseil d'administration aurait accepté le code, y compris les modifications proposées par le ministre, c'est lui qui se chargerait de l'appliquer et d'en contrôler l'observation.

La Commission Lambert prônait que les entreprises mixtes (les organismes de la Couronne dont le gouvernement fédéral assume directement une partie de la propriété avec d'autres participants aux fins d'appliquer une politique gouvernementale ou de répondre à un besoin public) suivent les normes et les usages acceptés par le secteur privé en matière de gestion dans tous les domaines, y compris la classification "d'initié" et les déclarations, la

confidentialité et les exigences en matière de conflit d'intérêts. Selon elle, le gouvernement devait faire respecter ses normes commerciales et d'éthique par les entreprises mixtes par le biais de ses représentants au conseil.

Aucune politique gouvernementale concernant le droit des sociétés commerciales de la Couronne de fonctionner comme d'autres entreprises commerciales ne devrait nuire à l'élaboration d'une politique cohérente en matière d'éthique professionnelle. Le fait que le rôle des sociétés de la Couronne comporte un élément de bien public (celles-ci servant d'instrument à la politique publique et étant tenues de rendre des comptes face à cette politique) plaide en faveur de codes d'éthique pour les employés de ces sociétés. Plus les sociétés commerciales de la Couronne se rapprochent du secteur privé, plus convaincant est l'argument en faveur d'un code d'éthique puisque, suivant les pratiques commerciales des entreprises du secteur privé, les sociétés de la Couronne seraient amenées à adopter des codes d'éthique et des règles en matière de conflits d'intérêts, tout comme un grand nombre de sociétés canadiennes privées l'ont fait au cours des dernières années.

d) Codes d'éthique actuels des sociétés de la Couronne

Certains cadres supérieurs des sociétés de la Couronne sont présentement assujettis aux lignes directrices sur les conflits d'intérêts à titre de personnes nommées par le gouverneur en conseil; en outre, un certain nombre de sociétés de la Couronne ont mis au point des codes d'éthique ou des règles sur les conflits d'intérêts. Dans certains cas, ces règles sont l'équivalent d'un code détaillé alors que dans d'autres cas elles se limitent à quelques dispositions générales. Voici un échantillon représentatif de la situation actuelle.

La Société canadienne d'hypothèques et de logement (SCHL) utilise plusieurs ensembles différents de lignes directrices. On a rédigé, à l'intention des membres du conseil d'administration qui ne sont pas des dirigeants de la société et qui ne sont pas membres de la fonction publique, un ensemble de lignes directrices qui comprennent les dispositions de la Loi sur la SCHL, celles de la partie IV de la Loi sur les corporations commerciales canadiennes ainsi que celles du projet de loi C-27 (Loi concernant les sociétés d'État, qui a reçu la première lecture en 1979, et qui traite des conflits d'intérêts et des administrateurs qui détiennent des postes à temps partiel).

Selon ces lignes directrices, l'administrateur ne peut être administrateur, dirigeant ou employé d'un établissement de prêt, non plus qu'il ne peut être employé par un gouvernement provincial ou dans la fonction publique du Canada, ni détenir un poste dont le traitement est payé à même les deniers publics. En outre, l'administrateur ne peut détenir, directement ou indirecte-

ment, des actions dans une institution de prêt; toute offre de nomination à un poste d'administrateur d'une autre société de même que tout poste d'administrateur détenu le jour de la nomination comme administrateur de la SCHL doivent être déclarés au Secrétaire général de la SCHL.

La SCHL applique aussi des règles concernant la divulgation d'autres postes d'administrateurs ou d'autres charges et des intérêts touchant un contrat important, ainsi que des lignes directrices concernant les emplois ultérieurs. D'autres employés de la SCHL sont soumis aux lignes directrices de 1973 touchant les fonctionnaires et aux normes supplémentaires de conduite figurant aux lignes directrices et au manuel de procédures de la société. Ces normes visent à assurer, entre autres, qu'il n'existe aucun conflit réel ou apparent entre les intérêts d'un employé et ses fonctions officielles. L'employé ne peut utiliser à des fins d'investissement les dispositions de la Loi nationale sur l'habitation portant sur le financement ni discuter publiquement, oralement ou par écrit, des affaires, des politiques ou de l'organisation de la société. Il a toutefois le droit le prendre des emplois secondaires. Les dispositions interdisant l'activité politique sont les mêmes que celles qui figurent à la Loi sur l'emploi dans la Fonction publique, si ce n'est que la Direction de la SCHL se réserve le droit d'accorder un congé aux employés qui font une campagne de nomination ou une campagne électorale. Les infractions à ces règles constituent un cas d'inconduite, passible de congédiement.

Le Centre national des arts a des statuts précis:

Aucun employé ne doit être en situation de conflit d'intérêts avec la Corporation et, en particulier:

a) Ne doit être intéressé directement ou indirectement à tout contrat passé avec la Corporation ou à tous biens ou services fournis à la Corporation ou à tout travail fait par ou pour la Corporation (si ce n'est en vertu de son propre contrat de services) à moins que, par suite de la nature particulière des biens, des services ou du travail que la Corporation peut se procurer d'un employé ou par son entreprise, obtenant ainsi un avantage qu'elle ne pourrait avoir autrement, le directeur général autorise par écrit l'acquisition de ces biens, de ces services ou de ce travail avec l'approbation du président ou du vice-président.

b) Détenir un emploi ou travailler contre rémunération ou bénéfice, autrement que conformément aux dispositions de son contrat avec la Corporation, sauf autorisation expresse du directeur général, avec l'approbation du président ou du vice-président.

L'énoncé de politique d'Air Canada est conforme à la pratique normale en ce qu'il demande aux employés de régler leurs affaires privées de façon à éviter les conflits réels et apparents où des situations compromettantes, des intérêts pécuniaires et autres sont en jeu. Le code comporte une liste de sources éventuelles de conflits soumises à la divulgation, à l'examen et à des conseils, notamment:

> le fait de servir d'administrateur, de détenir une charge, d'être employé, membre ou consultant d'une filiale ou d'une société associée, d'un fournisseur, d'un client important ou d'une entreprise concurrente, ou de toute autre compagnie, société, association ou entité commerciale qui a ou pourrait avoir des relations d'affaires importantes avec Air Canada, si ce service est susceptible d'imposer aux employés des exigences incompatibles avec leurs fonctions, de mettre en doute leur aptitude à s'acquitter de ces fonctions d'une façon objective ou de nuire au rendement.

Il y a une autre liste de conflits d'intérêts réels ou apparents qu'il faut éviter, notamment le mauvais usage d'informations et l'utilisation du matériel et du temps de la compagnie à des fins personnelles. Les domaines de conflit, réel ou éventuel, sont examinés par le comité de vérification d'Air Canada. Les employés doivent s'engager par écrit à respecter ces normes au moment de l'embauche et de temps à autre par la suite.

La Commission canadienne du blé pour sa part possède un ensemble de lignes directrices qui contiennent les clauses habituelles concernant les intérêts financiers, les déclarations à l'égard des renseignements confidentiels et leur divulgation pendant la durée de l'emploi ainsi qu'un avertissement aux employés quant à l'utilisation des renseignements confidentiels après leur départ.

Le code de l'Office de commercialisation du poisson d'eau douce est simple. Fondé sur la justice et l'impartialité, il interdit les cadeaux et les faveurs dans les relations d'affaires de même que les intérêts monétaires (des employés et de leur famille immédiate) dans une affaire reliée à l'Office. Sont également interdits les intérêts dans la pêche commerciale dans le secteur desservi par l'Office.

Un certain nombre de sociétés de la Couronne ont choisi d'adopter tout simplement sans modification les lignes directrices de 1973 touchant les fonctionnaires. Parmi celles-ci, mentionnons l'Office canadien des provendes et l'Administration du pilotage du Pacifique du Canada.

D'autres sociétés de la Couronne, comme l'Administration de la Voie maritime du Saint-Laurent et l'Office canadien du

poisson salé n'ont pas préparé de lignes directrices à cet égard pour leurs employés.

e) Façon d'aborder l'éthique en ce qui concerne les sociétés de la Couronne

Nous désirons présenter à l'égard des sociétés de la Couronne, une série de recommandations conformes au programme général proposé pour le reste de la fonction publique et compatibles avec les recommandations qui seront probablement, à notre avis, formulées par d'autres concernant le rôle futur des sociétés de la Couronne au Canada.

Le personnel des sociétés de la Couronne se divise en deux catégories, assujetties à des règles différentes: les personnes nommées par le gouvernement doivent respecter les lignes directrices élaborées par celui-ci, et les personnes engagées par la société elle-même sont assujetties au code d'éthique ou au règlement adopté par celle-ci.

Même si un grand nombre d'employés de sociétés de la Couronne n'acceptent peut-être pas d'être perçus par la population comme faisant partie du gouvernement fédéral, la plupart admettent faire partie d'une façon quelconque du secteur public. C'est pour cette raison que bon nombre de nos recommandations antérieures, le code d'éthique et d'autres documents, utilisent l'expression "secteur public" qui est plus large. Notre intention avouée est de concevoir un programme applicable à tous les secteurs du gouvernement fédéral, y compris ceux qui se considèrent autonomes. Aucune disposition du code d'éthique ne devrait poser de problème à quiconque travaille dans une société de la Couronne.

En second lieu, les dispositions de la Loi sur les corporations commerciales canadiennes touchant les conflits d'intérêts devraient s'appliquer aux sociétés de la Couronne qui constituent des entreprises commerciales, en particulier, l'article 115 de cette loi, qui traite de la divulgation par un administrateur ou un dirigeant de tout intérêt à un contrat important avec la Corporation ou d'un intérêt important à tout contrat proposé avec la Corporation. Les devoirs fiduciaires des administrateurs et des dirigeants des corporations, exposés à l'article 117 de la Loi sur les corporations commerciales canadiennes devraient s'appliquer. Dans l'exercice deleurs pouvoirs et de leurs fonctions, la loi leur impose d'"agir avec intégrité et de bonne foi au mieux des intérêts de la Corporation" et "d'apporter à leurs fonctions le soin, la diligence et la compétence dont une personne raisonnablement avisée ferait preuve dans des circonstances comparables".

En troisième lieu, chaque société devrait élaborer son propre code complémentaire d'éthique professionnelle, le faire

approuver par le ministre responsable et le publier. Nous recommandons la même démarche pour les sociétés de la Couronne que pour les ministères et organismes du gouvernement. Celles qui n'ont pas encore de code complémentaire devraient en préparer, et celles qui ont déjà des règles voudront peut-être les reformuler avec l'aide du Bureau de l'éthique dans le secteur public.

C'est à notre avis au conseil d'administration de chacune des sociétés de la Couronne qui possède un tel conseil qu'il devrait revenir d'élaborer le code complémentaire et c'est aux administrateurs qu'il appartiendra d'établir la politique en matière de conflits d'intérêts. Pour les conseils d'administration qui désireraient l'aide du Bureau de l'éthique dans le secteur public, nous recommandons que le Bureau prépare un inventaire des points à traiter ainsi qu'un modèle de code complémentaire de sorte que les définitions, les termes et les méthodes soient les mêmes dans tout le secteur public. Un certain nombre de mémoires qui nous ont été présentés par les chefs des sociétés de la Couronne nous portent à croire que toute aide du Bureau de l'éthique dans le secteur public sera bienvenue à cet égard. Les codes complémentaires devraient porter sur les besoins particuliers d'une société de la Couronne donnée et traiter des questions qui ne sont pas visées par les principes généraux du code d'éthique.

Le code complémentaire, adapté pour chaque société de la Couronne, serait soumis à l'approbation du ministre responsable et publié. Il s'appliquerait à toute la société de la Couronne, du premier au dernier échelon. Puisque c'est au conseil d'administration de chaque société qu'il reviendrait de décider de l'ampleur qu'il veut donner aux questions traitées dans son code complémentaire, il ne nous est pas nécessaire de distinguer les divers types de sociétés de la Couronne selon leurs fonctions commerciales. Pour donner effet à cette recommandation, nous suggérons que la Loi sur l'éthique dans le secteur public stipule que les sociétés de la Couronne doivent établir des statuts analogues au modèle de code complémentaire préparé par le Bureau de l'éthique dans le secteur public, mais en leur laissant la principale responsabilité de cette tâche.

En quatrième lieu, le président d'une société de la Couronne devrait être autorisé à renvoyer une question au Conseiller en éthique à des fins de consultation ou d'enquête, selon qu'il le juge à propos. Cette démarche est semblable à celle que pourrait utiliser un sous-ministre à l'égard d'une question d'éthique soulevée dans son ministère.

Cinquièmement, au moment de leur nomination, les administrateurs d'une société de la Couronne devraient être obligés de divulguer, à titre confidentiel, leurs avoirs et leurs activités financières au Conseiller en éthique. Celui-ci serait alors en mesure de leur indiquer tout conflit d'intérêts probable

dont ils pourraient vouloir tenir compte dans l'exercice de leurs fonctions et qu'ils pourraient résoudre par les moyens prévus à cette fin. À notre avis, cette exigence devrait s'appliquer également aux administrateurs à temps complet et aux administrateurs à temps partiel.

Sixièmement, les contrats d'emploi avec les sociétés de la Couronne devraient comporter une disposition précise traitant des activités interdites après que l'employé a quitté la société, dans le sens du chapitre 14 du présent rapport qui traite de la politique à l'égard des emplois ultérieurs pour les ministres et les fonctionnaires. Nous ne favorisons pas une démarche trop contraignante à cet égard. Cependant, nous reconnaissons qu'il est de l'intérêt public de se protéger contre les abus qui peuvent survenir lors des emplois ultérieurs.

Puisque bon nombre des personnes nommées par le gouverneur en conseil à des charges ou à des postes d'administrateurs dans les sociétés de la Couronne exercent leurs fonctions à temps partiel seulement, les codes complémentaires devraient tenir compte de ce fait, au besoin, en prévoyant des règles particulières. Un très petit nombre de règles seraient nécessaires, puisque les dispositions fondamentales de la Loi sur les corporations commerciales canadiennes à l'égard des conflits d'intérêts et du devoir fiduciaire s'appliqueraient (si l'on donne suite à notre recommandation à cet égard) et régiraient les actes des administrateurs et des dirigeants, qu'ils soient à temps partiel ou à temps plein.

Nous croyons que ces recommandations peuvent s'appliquer à toutes les sociétés de la Couronne. Cette démarche, croyons-nous, permet de faire les différences nécessaires entre les diverses catégories de sociétés de la Couronne, en tirant parti des avantages d'un code écrit, utilisant une terminologie et des procédures communes dans tout le secteur public, mais adapté aux besoins des diverses sociétés de la Couronne.

CHAPITRE 18

MISE EN APPLICATION DU NOUVEAU RÉGIME

a) Méthodes de mise en application

Nous avons recommandé des dispositions de fonds ainsi qu'un certain nombre de dispositions secondaires pour régler les questions relatives aux conflits d'intérêts.

La plupart de nos recommandations peuvent être appliquées par décret sans devoir passer par les voies législatives. Néanmoins, il y a des exceptions et certaines dispositions devront être adoptées par le Parlement. L'une de ces exceptions concerne les organismes quasi-judiciaires: les lois constitutives de ces organismes devraient être examinées, et les modifications proposées devraient ête soumises au Parlement de façon à s'assurer que des règles acceptables destinées à minimiser les conflits d'intérêts chez leurs membres et employés y sont incorporées. Une autre de ces exceptions a trait aux sociétés de la Couronne qui, comme nous le recommandons, devraient être assujetties à un ensemble de dispositions concernant les conflits d'intérêts aux termes de la Loi sur les corporations commerciales canadiennes, et dont les conseils d'administration devraient se doter d'un code d'éthique supplémentaire adapté à leurs besoins propres. Ce code serait adopté par voie de règlement et soumis à l'approbation du gouverneur en conseil. L'article 32 de la Loi sur l'emploi dans la Fonction publique constitue une autre exception qui nécessiterait une intervention par voie législative.

Nous recommandons que le nouveau régime proposé, dont les principales caractéristiques sont les suivantes:

- adoption d'un Code d'éthique s'appliquant dans tout le secteur public fédéral et

- création d'un Bureau de l'éthique dans le secteur public à qui sera dévolu le rôle actuel du sous-registraire général adjoint en matière de conflits d'intérêts et qui sera investi d'autres pouvoirs,

soit approuvé par le Parlement au moyen d'une résolution, ou, de préférence, au moyen d'une loi. Les autres dispositions de ce régime pourraient être incluses dans la loi.

On pourrait tenir un débat où les nombreuses questions et préoccupations abordées dans le présent rapport seraient mises en confrontation. De plus, l'appui du Parlement donnerait plus de force au Code d'éthique pour le secteur public et lui conférerait une valeur symbolique. De la même façon, la création du Bureau de l'éthique dans le secteur public, au moyen d'une loi ou d'une résolution du Parlement plutôt que par voie de décret, accroîtrait l'importance du Bureau et du Conseiller en éthique.

Il ne serait cependant pas judicieux d'inclure dans une loi du Parlement les procédures détaillées que doivent respecter les titulaires de charges publiques en vue de minimiser les conflits d'intérêts. Ces procédures étant sujettes à des modifications occasionnelles, il serait nécessaire dans chaque cas, de demander au Parlement de modifier la loi, et les changements souhaités ne pourraient être mis en vigueur qu'après d'inévitables et d'indésirables retards. Il suffit, à notre avis, que les procédures figurent dans le règlement d'application de la loi et que, comme il est indiqué dans l'avant-projet de loi, le Conseiller en éthique fasse rapport sur l'observation des règles.

b) Avant-projet de loi sur l'éthique dans le secteur public

Dans le but de provoquer une discussion, nous avons préparé un avant-projet de loi qui pourrait être déposé au Parlement, à supposer évidemment que ce soit le moyen choisi pour mettre en application les recommandations du présent rapport. La loi exigerait que les titulaires de charges publiques agissent conformément à certaines lignes de conduite. Elle prévoirait la création d'un Bureau de l'éthique dans le secteur public et la nomination d'un Conseiller en éthique qui serait le responsable du Bureau et qui serait chargé de l'administration des procédures visant à minimiser les conflits d'intérêts parmi les employés du secteur public. Elle prévoirait également la modification des lois constitutives de certains organismes quasi-judiciaires dans le but de réduire la possibilité de conflits d'intérêts au sein de ces organismes.

L'avant-projet de loi est présenté à l'annexe E du présent rapport.

c) Nécessité de comprendre le problème et d'en discuter avant d'appliquer le programme

La mise en application des recommandations au moyen d'une loi suscitera un débat public beaucoup plus important que la simple promulgation d'un décret. De plus, il est essentiel que tous puissent donner leur opinion sur les questions d'éthique au sein de l'administration publique. Il s'agit d'un aspect important du processus de sensibilisation de la population que le gouvernement doit amorcer s'il a l'intention de légiférer en ce domaine.

Dans votre lettre, Monsieur le Premier ministre, vous nous avez demandé d'étudier ce qui se fait en ce domaine dans le secteur privé. Nous nous sommes donc entretenus avec un certain nombre de cadres supérieurs de sociétés qui au cours des dernières années ont préparé des règles concernant les conflits d'intérêts ou adopté un code d'éthique. Tous nous ont livré le même message: il n'est pas utile et il est parfois néfaste, de se contenter d'annoncer que de nouvelles règles sont en vigueur et de les afficher au tableau. Il est essentiel de les élaborer progressivement, en faisant participer les employés qui seront visés et en leur demandant leurs suggestions.

Outre qu'ils préconisent la mise à contribution des employés, les cadres interrogés ont souligné la nécessité d'une participation des gestionnaires et des dirigeants au plus haut niveau. On a eu le plus de succès lorsque le président-directeur général, et pas seulement le directeur du personnel, s'intéressait activement à la question et avait indiqué à tous les employés qu'il s'agissait d'une question de première importance. Si on les transpose au secteur public, ces faits nous montrent avec évidence la marche à suivre.

d) Autre méthode de mise en application: le contrat d'engagement

Nous croyons qu'il est important de donner force de loi au Code d'éthique, ce qui peut se faire de deux façons: soit en faisant adopter par le Parlement une loi, dont le Code ferait partie intégrante: c'est la voie que nous recommandons; soit, en incluant le Code dans les conditions des contrats d'engagement du gouvernement du Canada. Cette deuxième solution s'appliquerait différemment selon le poste qu'occupe le titulaire de charge publique. Dans le cas des employés assujettis à une convention collective de travail, le Code d'éthique pourrait être incorporé dans la convention; dans le cas des titulaires de charges publiques qui n'ont pas signé de contrat d'engagement et qui occupent un poste à titre amovible ou pour une période déterminée, l'approche pourrait être différente.

Lorsqu'on parle de règles en matière d'éthique qui seraient expressément inscrites dans les contrats des titulaires de charges publiques, il ne s'agit pas uniquement du Code d'éthique (auquel vraisemblablement les titulaires seraient déjà assujettis, selon les termes de la loi adoptée) mais aussi du code d'éthique supplémentaire du ministère ou de l'organisme pour qui le titulaire travaille. Dans tous les cas où cela est réalisable, nous recommandons que le Code d'éthique fasse partie intégrante de tout contrat d'engagement ou document de même nature régissant les conditions d'emploi ou d'occupation de fonction. Lorsque le contrat d'engagement ne constitue qu'un échange de lettres, la conclusion du contrat se matérialisant dans la signature des lettres par l'employé et le gouvernement fédéral, nous recom-

mandons que le Code d'éthique soit annexé à ces lettres et constitue l'une des conditions régissant l'occupation du poste. Nous avons examiné les pratiques en vigueur dans divers ministères concernant l'envoi des lettres d'offre. Certains ministères ne font aucune mention de lignes directrices sur les conflits d'intérêts; certains y font allusion et se contentent d'indiquer en quoi elles consistent de façon générale et où on peut se les procurer; d'autres, enfin, envoient une copie des lignes directrices et des renseignements connexes.

De toute façon, qu'il y ait contrat d'engagement ou pas, nous recommandons que chaque titulaire de charge publique soit tenu de signer une fois l'an une copie du Code d'éthique. Cette pratique est utilisée dans bien des sociétés privées et ce, pour tout le personnel, de l'employé subalterne le plus bas dans l'échelle hiérarchique jusqu'au président-directeur général. Nous ne voulons pas encourager la paperasserie, mais, dans certains cas, cette procédure peut être intégrée.

Quelques ministères et bureaux du gouvernement utilisent déjà une variante de ce système. Par exemple, le ministère des Finances a une formule sur laquelle l'employé reconnaît qu'il a reçu une note concernant les conflits d'intérêts signée par le sous-ministre des Finances le 19 mars 1982. Cette note comporte un extrait du décret C.P. 1973-4065 du 18 décembre 1973 intitulé "Lignes directrices auxquelles les fonctionnaires doivent se conformer en cas de conflits d'intérêts". Au Bureau du vérificateur général, les employés doivent, à leur entrée en fonction, signer une déclaration dans laquelle ils affirment qu'eux ou leur famille immédiate n'ont aucun intérêt qui pourrait compromettre leur objectivité ou remettre en question leur jugement. Cette déclaration oblige aussi l'employé à informer les autorités responsables à l'administration centrale de tout conflit d'intérêt qui pourrait surgir ultérieurement.

CHAPITRE 19

CONCLUSIONS ET RESUMÉ DES RECOMMANDATIONS

a) En guise de conclusion

Notre étude nous amène à conclure qu'il était grand temps de faire un examen approfondi des règles régissant la conduite professionnelle des membres du secteur public fédéral, particulièrement en ce qui a trait aux conflits d'intérêts. Ce n'est pas l'intégrité des fonctionnaires fédéraux qui est en cause, bien au contraire. Leur respect des règles est digne de mention, ce qui devrait réjouir tous les Canadiens. Cependant, ces règles ont changé graduellement au fil des années, selon les problèmes qui survenaient, et il faut maintenant les reformuler de façon à les rendre plus uniformes, sur le plan tant du contenu que du mode d'application, et aussi simples, équitables et raisonnables que possible.

Notre mandat précisait que nous devions nous attacher "en particulier au besoin de garantir l'intégrité de l'appareil gouvernemental et la confiance qui lui accorde le public, ainsi qu'à la nécessité d'attirer au service de l'État des personnes du plus haut calibre et de tous les secteurs de la société." Ce sont ces objectifs que nous avons visés en formulant nos recommandations. Nous ne croyons pas qu'un Canadien hautement compétent hésitera à occuper un poste dans la fonction publique parce qu'on lui demande d'avoir une conduite conforme à l'éthique et de respecter des règles raisonnables voulant qu'il évite toute activité et se défasse de tout bien qui risque de créer une situation de conflit entre ses devoirs professionnels et ses intérêts privés. Au contraire, l'existence de normes élevées en cette matière l'incitera à entreprendre une carrière dans le secteur public.

Toutefois, certaines règles imposent des sacrifices inutiles aux titulaires de charges publiques et à leurs familles, ce qui est inéquitable à leur endroit et nuit au recrutement de personnes hautement compétentes. C'est pourquoi nous recommandons que soient établies des règles claires et facilement applicables, et qu'il n'y en ait pas plus que nécessaire.

Dans le présent rapport, nous passons en revue les politiques s'appliquant à l'éthique et aux conflits d'intérêts dans les provinces canadiennes et le Royaume-Uni ainsi qu'en Australie et en Nouvelle-Zélande, qui possèdent tous des institu-

tions parlementaires semblables aux nôtres. Comme on pouvait s'y attendre, ces politiques diffèrent grandement d'une administration à l'autre, mais les principes suivis se rapprochent de ceux qu'applique le gouvernement fédéral. Plusieurs provinces décrivent les règles qu'elles ont établies comme des "lignes directrices". En règle générale, on peut dire en toute honnêteté que les lignes directrices en vigueur dans l'administration fédérale sont, en ce qui a trait aux devoirs professionnels et aux conflits d'intérêts, aussi exhaustives que celles de toute province canadienne, voire même plus exhaustives que la plupart d'entre elles; comparativement à celles qui sont appliquées au Royaume-Uni, en Australie et en Nouvelle-Zélande, elle sont nettement plus détaillées. Il est intéressant de noter qu'une seule des administrations que nous avons observées, à savoir celle de Terre-Neuve, a établi des restrictions écrites quant aux activités des ministres qui ont cessé d'exercer leurs fonctions.

Nos recommandations ne sont donc aucunement dictées par le besoin de "rejoindre" les provinces et les autres pays.

Nous nous sommes également penchés sur les pratiques en vigueur aux États-Unis. Même si le régime politique n'y est pas le même qu'au Canada et qu'on y favorise une attitude plus juridique, nous avons été impressionnés par certaines des mesures prises tant par les divers états que par le gouvernement fédéral en vue de diffuser, à tous les niveaux du secteur public, des règles s'appliquant aux devoirs professionnels et aux conflits d'intérêts, ainsi que par l'importance accordée à la divulgation et à ce qu'ils appellent la "transparence gouvernementale".

Nous avons par ailleurs demandé et obtenu un bon nombre de renseignements récents sur la façon dont les questions d'éthique et de conflits d'intérêts sont traitées par les associations professionnelles et les entreprises. Il est étonnant de constater l'intérêt croissant que celles-ci portent à la perception qu'a le public de leurs normes d'éthique. Les associations de médecins, d'ingénieurs et d'avocats ont depuis longtemps formulé des principes à cet égard, mais elles sont actuellement en train de les réexaminer pour voir s'ils satisfont aux exigences et aux attentes de plus en plus grandes du public. La même tendance semble se retrouver du côté des entreprises, dont un nombre croissant, particulièrement parmi les plus grandes, établissent un code d'éthique à l'intention de leurs cadres et de leurs employés et veillent à son application. Notre examen des pratiques en vigueur dans les grandes entreprises privées a renforcé notre conviction que des codes distincts doivent être appliqués dans chaque société de la Couronne fédérale, en plus des principes qui régiront la conduite de tous les titulaires de charges publiques.

Dans le cadre de nos travaux, nous avons reçu des centaines de lettres et effectué bon nombre d'entrevues. Toutes

les personnes interrogées ont émis certaines critiques à l'égard des lignes directrices actuelles, et la même attitude s'est retrouvée dans le courrier reçu. Personne n'a toutefois contesté la nécessité de règles écrites, quelle qu'en soit la forme, et, s'il y en eut, rares sont ceux qui se sont attaqués aux principes de base sur lesquels reposent les lignes directrices actuelles. Notre entrée au Cabinet remonte à 1957 dans un cas et à 1963 dans l'autre, donc, avant l'entrée en vigueur de directives écrites en cette matière. Nous reconnaissons néanmoins la nécessité de règles écrites et la validité des principes qui sous-tendent les lignes directrices actuelles.

Nous avons toutefois relevé de sérieuses lacunes dans la teneur et dans l'application des lignes directrices et des règles connexes touchant l'éthique et les conflits d'intérêts actuellement en vigueur. Il convient notamment de citer celles-ci:

- Les lignes directrices actuelles constituent un ensemble de principes régissant les devoirs professionnels et de règles visant à minimiser les conflits d'intérêts; leur application est tantôt recommandée, tantôt obligatoire, d'où l'incertitude qu'éprouvent les intéressés.

- Les lignes directrices ne tiennent pas suffisamment compte des divers devoirs et responsabilités des personnes nommées par le gouverneur en conseil.

- On constate un certain manque d'uniformité pour ce qui est du contenu et de l'application des règles s'appliquant aux titulaires, dont le niveau est inférieur à celui de sous-ministre.

- Le manque de flexibilité des lignes directrices actuelles nuit parfois inutilement ou involontairement aux intéressés.

- Les lignes directrices ne s'appliquent pas, à juste titre, aux organismes gouvernementaux à vocation quasi judiciaire, mais la conduite des membres de certains de ces organismes n'est pas réglementée ou l'est insuffisamment.

- Le code d'éthique et les règles visant à minimiser les conflits d'intérêts s'appliquant aux sociétés de la Couronne et à leurs agents doivent être clarifiés.

- Les lignes directrices sur les emplois et activités des anciens titulaires de charges publiques ne reconnaissent pas suffisamment les différences entre les ministres et les hauts fonctionnaires quant aux circonstances entourant leur départ. En outre, elles sont ambiguës et, à certains égards, inutilement restrictives.

Nos recommandations visent non seulement à combler ces lacunes mais aussi à rehausser la confiance du public quant à l'intégrité du processus gouvernemental au niveau fédéral. Nous croyons que le temps est venu de codifier et de faire mieux connaître les règles touchant l'éthique dans le secteur public et d'en faire approuver l'application par le Parlement.

Nous croyons également que l'établissement d'un Bureau de l'éthique dans le secteur public, organisme gouvernemental qui serait chargé uniquement d'administrer les règles visant à minimiser les conflits d'intérêts et qui serait dirigé par une personne d'expérience reconnue pour son intégrité, contribuerait à accroître la confiance du public.

b) Sommaire des principales recommandations

Le présent rapport contient de nombreuses recommandations touchant les devoirs professionnels et les conflits d'intérêts dans le secteur public. Celles qui illustrent l'approche générale que nous favorisons se trouvent résumées dans les paragraphes qui suivent. À titre informatif, les chapitres auxquels elles se rattachent sont indiqués entre parenthèses.

A. Règles simples, équitables et raisonnables

Les règles et procédures touchant l'éthique devront être simples, équitables et raisonnables.

(Chapitre 2)

B. Responsabilité individuelle

Le principe de la responsabilité individuelle devra être maintenu dans tout système de règles régissant les devoirs des membres de la fonction publique.

(Chapitre 4)

C. Nouvelle formulation des règles

Le terme "lignes directrices" devra être abandonné parce que trop ambigu.

Les lignes directrices actuelles devront être remplacées par ce qui suit:

I) un Code d'éthique bref et simple s'appliquant à tous les titulaires de charges publiques;

II) des règles de procédure visant à minimiser les conflits d'intérêts semblables à celles qui obligent les titulaires de charges publiques à se dessaisir de certains titres et biens, dont la teneur dépendra du rang, du niveau, et, si possible, des devoirs et

responsabilités des intéressés; comme à l'heure actuelle, les règles les plus précises s'appliqueront aux ministres et sous-ministres;

III) des codes complémentaires de pratiques et de règles, qui permettront de régler les problèmes de conflits d'intérêts propres à certains ministères, sociétés de la Couronne et organismes gouvernementaux; ceux qui existent déjà devront être reformulés et uniformisés quant au contenu et au mode d'application.

(Chapitre 12)

D. Bureau de l'éthique dans le secteur public

Il faudra instituer un Bureau de l'éthique dans le secteur public, lequel devra être placé sous la direction d'une personne d'expérience reconnue pour son intégrité, qui sera connue sous le nom de Conseiller en éthique.

Ce Bureau devra s'acquitter des fonctions actuellement confiées au sous-registraire général adjoint (SRGA) et disposer de pouvoirs supplémentaires lui permettant d'offrir des conseils, de sensibiliser les intéressés, d'agir en qualité d'administrateur, de faire enquête, de modifier ou de ne pas appliquer certaines règles de procédure dans les cas où aucune infraction au Code d'éthique n'a été commise.

Le nouveau Conseiller en éthique devra avoir un mandat plus clair, des pouvoirs plus étendus et un profil public plus élevé que le SRGA.

(Chapitre 13)

E. Juges et organismes quasi judiciaires

Il faudra préserver l'indépendance des membres de la magistrature qui sont nommés par le gouvernement fédéral. Quoique assujettis au Code d'éthique, ils devront continuer d'être soustraits à l'application des règles de procédure visant à minimiser les conflits d'intérêts et de se plier aux dispositions de la Loi sur les juges à cet égard.

De même, dans le but de laisser aux organismes quasi judiciaires une indépendance suffisante, un "code complémentaire" particulier devra être intégré aux lignes directrices de chacun. Ces règles et procédures complémentaires devront tenir compte du mandat de chaque organisme et être mises au point de concert avec ce dernier.

(Chapitre 16)

F. Sociétés de la Couronne

En tant que membres de la fonction publique fédérale, les employés des sociétés de la Couronne devront être assujettis au Code d'éthique. Les personnes nommées par le gouverneur en conseil au sein de ces sociétés devront se plier aux règles de procédure visant à minimiser les conflits d'intérêts. Quant aux employés engagés directement, ils devront se soumettre à tout code complémentaire établi par la direction. Chaque société de la Couronne devra établir son propre code d'éthique complémentaire et le faire approuver par le ministre responsable. L'élaboration de ces codes complémentaires incombera au conseil d'administration, lequel devra, en vertu de la Loi sur l'éthique dans le secteur public, appliquer les normes établies à cet égard par le Bureau de l'éthique dans le secteur public.

Le président d'une société de la Couronne devra être autorisé à consulter le Conseiller en éthique concernant certaines questions ou lui demander de faire enquête, selon les circonstances.

Les personnes nommées au sein du conseil d'administration d'une société de la Couronne devront être tenues de révéler au Conseiller en éthique, sous le sceau de la confidentialité, tous leurs titres financiers.

Les contrats d'engagement devront spécifier les activités interdites après que l'intéressé aura cessé d'exercer ses fonctions.

Les dirigeants et les administrateurs des sociétés de la Couronne qui poursuivent des activités commerciales devront être assujettis aux dispositions de la Loi sur les corporations commerciales canadiennes concernant les conflits d'intérêts.

(Chapitre 17)

G. Dessaisissement des biens

Les modifications suivantes devront être apportées aux procédures actuelles visant à minimiser les conflits d'intérêts:

I) les ministres devront avoir de nouveau la possibilité de déposer leurs titres dans une fiducie en compte bloqué, sous réserve des limites déterminées et approuvées par le Bureau de l'éthique dans le secteur public dont la création a été proposée;

II) une règle de minimis devra être établie afin d'éviter toute difficulté ou dépense inutile aux personnes dont les intérêts ou les investissements sont peu importants;

III) le nombre de biens à l'égard desquels la déclaration, tant publique que confidentielle, est suffisante devra être augmenté afin que les intéressés n'aient plus à se dessaisir de leurs biens en les vendant ou en les confiant à un fiduciaire. (Chapitre 6)

H. Ambassadeurs et chefs de missions

Les personnes en poste à l'étranger et nommées par le gouverneur en conseil, dont les ambassadeurs et les chefs de missions, devront être traitées de la même façon que les hauts fonctionnaires qui relèvent du ministère des Affaires extérieures et être assujetties aux règles complémentaires appliquées par celui-ci. (Ces personnes doivent actuellement se plier aux règles sur le dessaisissement au même titre que les titulaires nommés par le gouverneur en conseil.)

(Chapitre 9)

I. Conjoints

La clarification des lignes directrices actuelles concernant les biens et les activités du conjoint et des autres membres de la famille des intéressés devra être incorporée dans les règles de procédure visant à minimiser les conflits d'intérêts ainsi que dans les codes complémentaires en application dans les ministères, les organismes et les sociétés de la Couronne. Aucun bien ne saurait être transféré à un conjoint ou à un membre de la famille dans le seul but d'éviter l'application d'une règle de procédure.

(Chapitre 11)

J. Activités après-mandat

Le Code d'éthique devra comprendre l'énoncé suivant: À l'expiration de leur mandat, les titulaires de charges publiques ont le devoir d'agir de façon à ne laisser planer aucun doute quant à la probité et à l'impartialité de l'appareil gouvernemental et à ne diminuer d'aucune façon la confiance du public dans l'intégrité du gouvernement.

Les restrictions concernant l'application de cette disposition du code devront être aussi peu nombreuses et aussi précises que possibles de façon à faciliter les déplacements entre les secteurs public et privé et à reconnaître la différence entre les ministres et les titulaires non élus de charges publiques quant aux circonstances entourant leur départ.

Aux fins de l'application de ce qui précède, les règles de procédure visant à minimiser les conflits d'intérêts devront prescrire des délais (période de transition) que les intéressés seront tenus de respecter avant 1) d'accepter un poste d'adminis-

trateur, 2) d'agir à titre de représentant, 3) d'utiliser de l'information confidentielle et 4) de faire volte-face concernant certaines questions qui relevaient de leurs compétences lorsqu'ils occupaient une charge publique.

Dans le cas de transactions entre d'anciens fonctionnaires et le gouvernement, ce sont les titulaires en poste qui seront clairement chargés d'éviter tout traitement préférentiel.

Les anciens titulaires de charges publiques devront avoir le droit de présenter au Conseiller en éthique tous les détails se rapportant à l'offre qu'ils ont reçue d'occuper un poste dans le secteur privé et de demander que la période de transition précitée soit levée ou modifiée pourvu que ladite offre ne porte nullement atteinte à l'intégrité du gouvernement. Toutes les demandes et décisions devront être formulées par écrit et rendues publiques.

(Chapitre 14)

K. Activités politiques des fonctionnaires

Les restrictions concernant les activités politiques et les déclarations publiques des fonctionnaires devront, en principe, demeurer inchangées. Elles devront toutefois figurer dans le nouveau Code d'éthique et la responsabilité administrative à cet égard devra désormais être confiée au Bureau de l'éthique dans le secteur public plutôt qu'au Conseil du Trésor et à la Commission de la Fonction publique.

Les dispositions de l'article 32 de la Loi sur l'emploi dans la Fonction publique devront désormais figurer dans la nouvelle Loi sur l'éthique dans le secteur public. Le Bureau de l'éthique dans le secteur public sera dès lors responsable des demandes présentées par des titulaires de charges publiques non élus pour obtenir un congé à des fins politiques.

(Chapitre 15)

L. Intervention du Parlement

Le Parlement devra adopter une Loi sur l'éthique dans le secteur public. Cette loi devra assujettir tous les membres du secteur public fédéral au Code d'éthique, porter création du Bureau de l'éthique dans le secteur public, conférer à certaines personnes le droit de promulguer, sous forme de règlements, des règles de procédure visant à minimiser les conflits d'intérêts, et régler certains problèmes de procédures dans les sociétés de la Couronne et les organismes quasi judiciaires.

(Chapitre 18)

M. Contrats d'engagement

Afin de donner force de loi au Code d'éthique, son application devra faire partie des conditions établies dans les contrats d'engagement offerts par le gouvernement du Canada.
(Chapitre 18)

ANNEXE A

Témoignages

Nous voulons exprimer notre gratitude aux fonctionnaires du Bureau du Conseil privé, notamment André Bissonnette, premier conseiller en gestion du personnel; Jim Millar, chef, Nominations supérieures et ressources humaines; Joseph Cullen et Huguette Messier, agents du Conseil privé.

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La Commission de la Fonction publique nous a également fourni des renseignements précieux et nous voulons souligner plus particulièrement l'aide que nous ont fournie M. Edgar Gallant, son président et la commissaire Jennifer McQueen. Nous voulons aussi remercier Anita Szlazak, ancienne commissaire qui est maintenant directrice exécutive du Bureau des jeux olympiques d'hiver de 1988, gouvernement du Canada.

La Commission de réforme du droit nous a aidé en nous expliquant les études qui y ont été effectuées dans plusieurs domaines couverts par notre rapport. Nous en remercions Alan Reid, commissaire; Joan Arnold, consultante et Mario Bouchard, coordonnateur, Section du droit administratif.

Nous tenons à remercier ceux qui ont donné de leur temps en assistant à des audiences et en présentant des exposés sur les questions relatives aux conflits d'intérêt. Parmi ceux-ci, on compte des particuliers et des représentants d'entreprises du secteur privé. Les personnes interrogées qui sont actuellement dans le secteur public ou qui en ont déjà fait partie sont les suivantes: l'honorable Lincoln Alexander, ancien ministre du Travail; James P. Bruce, sous-ministre adjoint, Service de l'environnement atmosphérique, Environnement Canada; Robert B. Bryce, ancien greffier du Conseil privé; l'honorable J. Judd

Buchanan, ancien ministre d'État chargé des Sciences et de la Technologie; l'honorable Iona Campagnolo, ancien ministre d'État à la Condition physique et au Sport amateur; Edmund Clark, secrétaire associé du Conseil du Trésor; Sylvain Cloutier, président, Société pour l'expansion des exportations; James C. Corkery, président-directeur général, Monnaie royale canadienne; l'honorable Barnett J. Danson, ancien ministre de la Défense nationale; l'honorable Robert R. de Cotret, ancien ministre d'État au Développement économique; Paul W. Dick, député; Geoffrey C. Edge, président, Office national de l'énergie; David C. Elder, directeur, Direction de la gestion du groupe exécutif et de la coordination des détachements, ministère des Affaires extérieures; Keith Evans, ministère de la Justice; R. Gordon L. Fairweather, président, Commission canadienne des droits de la personne; l'honorable Alastair W. Gillespie, ancien ministre de l'Énergie, des Mines et des Ressources; James Gillies, doyen de la Faculté des études en administration, Université York et ancien député; l'honorable Heward Grafftey, ancien ministre d'État chargé des Sciences et de la Technologie; James F. Grandy, ancien sous-ministre, ministère de l'Industrie et du Commerce; James G. Harris, sous-ministre adjoint, Direction du personnel, ministère des Affaires extérieures; Ivan L. Head, président, Centre de recherches pour le développement international; l'honorable Céline Hervieux-Payette, ministre d'État à la Jeunesse; Paul Labbé, président, Office canadien pour un renouveau industriel; J. Maurice LeClair, président Chemins de fer Nationaux; l'honorable Edward C. Lumley, ministre de l'Industrie et du Commerce; Marcel Massé, sous-secrétaire d'État aux Affaires extérieures; R.K. McLeod, fonctionnaire, Transports Canada; John Meisel, ancien président, Conseil de la radiodiffusion et des télécommunications canadiennes; C.R. Nixon, ancien sous-ministre de la Défense nationale; sénateur Michael Pitfield, ancien greffier du Conseil privé; l'honorable John M. Reid, député; Simon S. Reisman, ancien sous-ministre des Finances; le juge Margaret Rideout, coordonnateur national des juges de la citoyenneté; Donald K. Smith, directeur général, Service de l'environnement atmosphérique, Environnement Canada; William Teron, ancien président, Société canadienne d'hypothèques et de logement; Max Vermij, Transports Canada; Ramsey Withers, sous-ministre, Transports Canada; et John R. Woods, directeur exécutif, Conseil canadien des normes.

Notre étude du secteur privé nous a mis en contact avec des représentants de diverses professions et nous avons ainsi rencontré Robert McKercher, président, Claude Thompson, vice-président et Robert Wells, trésorier de l'Association du Barreau canadien.

Nous avons également colligé tous les codes d'éthique actuellement en vigueur dans la Fonction publique et dans les sociétés de la Couronne. Ces codes ont été analysés en fonction des données additionnelles fournies par des fonctionnaires quant à

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l'application des règles relatives aux conflits d'intérêts dans leur domaine de responsabilité. Ces personnes sont les suivantes: Liliana I. Birtz, conseiller général et secrétaire de la société, Société canadienne d'hypothèques et de logement; Docteur Pierre Bois, président, Conseil de recherches médicales du Canada; J.P. Connell, sous-ministre, Agriculture Canada; D.B. Dewar, sous-ministre, ministère de la Défense nationale; Léo A. Dorais, vice-président et secrétaire général, Musées nationaux du Canada; T.D. Finn, directeur exécutif, Groupe de transition chargé des renseignements pour la sécurité, Solliciteur général du Canada; Fred E. Gibson, solliciteur général adjoint, Solliciteur général du Canada; R.J. Giroux, sous-ministre, Revenu Canada (Douanes et Accise); R.M. Hammond, surintendant, Département des Assurances Canada; J.H. Jennekens, président, Commission de contrôle de l'énergie atomique; W.A. Kennett, inspecteur général des banques, ministère des Finances Canada; Larkin Kerwin, président, Conseil national de recherches du Canada; Maurice Lafontaine, sous-ministre, Affaires indiennes et du Nord Canada; Gaétan Lussier, sous-ministre et président, Emploi et Immigration Canada; l'honorable Donald S. Macdonald, président, Commission royale d'enquête sur l'union économique et les perspectives de développement pour le Canada; J.A.H. Mackay, sous-ministre, Travaux publics Canada; G.M. MacNabb, président, Conseil de recherches en sciences naturelles et en génie du Canada; G.W. McPherson, président du conseil d'administration, Ports Canada; Robert C. Montreuil, président, Société canadienne d'hypothèques et de logement; Gordon Osbaldeston, greffier du Conseil privé et secrétaire du Cabinet; W.R. Outerbridge, président, Commission nationale des libérations conditionnelles; George Post, sous-ministre, ministère de la Consommation et des Corporations; Robert Rabinovitch, sous-ministre, ministère des Communications; David W. Slater, président, Conseil économique du Canada; Stuart L. Smith, président, Conseil des sciences du Canada; et Gus Sonneveld, président intérimaire, Office canadien des provendes.

Certaines sociétés de la Couronne ont bien voulu répondre à nos demandes d'information. Nous voulons donc remercier Elix H. Anderson, président, Société du crédit agricole Canada; H.A. Anderson, président, Commission du port Alberni; Gordon Atherley, président-directeur général, Centre canadien d'hygiène et de sécurité au travail; Jacques Auger, président-directeur général exécutif, Ports Canada; G.A. Berger, sous-ministre adjoint, Secteur des opérations, Approvisionnements et Services Canada, et président, Corporation de disposition des biens de la Couronne; Laurent A. Bergeron, président, Les Arsenaux canadiens Limités; A.G. Bland, président, Construction de défense Canada; R.L. Boileau, gestionnaire, Recherche et administration, Canadien National; Chris Brown, président, Commission du port de Fraser; Ian Brown, gérant général, Commissaire du port de Toronto; Guy Coderre, vice-président des ressources humaines et de l'administration, Société Radio-Canada;

Howard E. Cohen, gérant général, Corporation du port; George W. Colquhoun, gérant du port, Commission du port de North Fraser; Jean-Claude Delorme, président-directeur général, Téléglobe Canada; James Donnelly, président, Énergie atomique du Canada Limitée; J.T. Dunn, président-directeur général, Société de commercialisation du poisson d'eau douce; Arthur F. Earle, conseiller du président, Corporation d'investissements au développement du Canada; W.H. Hopper, président-directeur général, Petro-Canada; Gorse Howarth, président, Corporation commerciale canadienne; R.A. Hubber-Richard, président, Administration de pilotage du Pacifique; W.E. Jarvis, commissaire en chef, Commission canadienne du blé; A.D. Latter, président, Administration de pilotage de l'Atlantique; Guy A. Lavigueur, président, Banque fédérale de développement; D.J.A. MacSween, directeur général, Centre national des Arts; Wilfrid Ménard, secrétaire, Administration de pilotage des Laurentides; P. Morrison, secrétaire, Commission d'énergie du Nord canadien; W.A. O'Neil, président, Voie maritime du Saint-Laurent; Francine Vallée Ouellet, secrétaire de la société, Air Canada; Ed Provost, président, Société de développement de l'industrie cinématographique canadienne; Marion Ricci, gestionnaire, secrétariat de la présidence, Centre canadien d'hygiène et de sécurité au travail; J. Smith, président, Commission d'énergie du Nord canadien; J.W. Snell, secrétaire, Commission canadienne du blé; Fernand Tremblay, président, Commission des champs de bataille nationaux; Michael Warren, président-directeur général, Société des postes du Canada, et William E. Wells, président, Office canadien du poisson salé.

Notre directeur exécutif, M. Boyer, a participé à la quatrième conférence annuelle de l'"Office of the Government Ethics" à Washington, D.C., le 4 octobre 1983 et à la cinquième conférence annuelle du "Council on Governmental Ethics Laws" à Montgomery (Alabama) du 7 au 9 décembre 1983. Il s'est ainsi renseigné sur l'expérience des Américains en ce domaine et sur les différentes façons d'aborder les problèmes de conflits d'intérêts. M. Boyer, accompagné de M. Robert Boyle, sous-registraire général adjoint, a rencontré M. Allan Gotlieb, ambassadeur du Canada et des hauts fonctionnaires américains à Washington, notamment M. David Martin, directeur du "Office of Government Ethics", Washington, et certains de ses employés et son honneur le juge Walter B. Tamm, président du "Judicial Ethics Committee" américain. Maître Jane S. Ley, juriste de l'"Office of Governement Ethics", nous a fourni des renseignements et des conseils inestimables et nous a mis en contact avec les fonctionnaires d'autres États, aussi responsables de questions d'éthique.

Nous voulons également souligner l'empressement des hauts officiels de plusieurs États à nous communiquer de la documentation sur leurs lois et politiques, notamment R. Roth Judd, directeur exécutif, "Ethics Board," Wisconsin; Gordon B.

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Nash jr, président du "Board of Ethics" de l'Illinois; Lawrence A. Gonzalez, directeur exécutif, "Commission on Ethics," Floride; Susan M. Harrigan, "Political Fair Practices Commission," Californie; Richard J. Murphy, directeur, "Executive Commission on Ethical Standards", New Jersey; Scott A. Weiner, directeur exécutif, "Election Law Enforcement Commission", New Jersey; Melvin G. Cooper, directeur exécutif, "State Ethics Commission", Alabama; Catherine O.Y. Chang, directrice exécutive, "State Ethics Commission", Hawaii.

À l'échelle provinciale, nous avons reçu l'aide de certains titulaires de charges publiques responsables des politiques relatives aux conflits d'intérêts ou bien informés sur celles-ci, notamment Warren Bailie, directeur des élections de l'Ontario et membre de l'exécutif du "Council on Governmental Ethics Laws"; Gordon H. Aiken, président de l'"Ontario Commission on Election Contributions and Expenses"; Robert J. Fleming, directeur de l'Administration de la Législature de l'Ontario; Pierre-F. Côté, Directeur général des élections et Président de la Commission de la représentation électorale du Québec.

D'autres fonctionnaires provinciaux nous ont particulièrement aidé en nous communiquant de l'information sur les lois et pratiques relatives aux conflits d'intérêts qui sont actuellement en vigueur au niveau provincial et municipal. Ce sont l'honorable A.R. Adam, ministre des Affaires municipales, province du Manitoba; Louis Bernard, secrétaire général du Conseil exécutif, gouvernement de la Saskatchewan; Rosalie Curran, secrétaire, ministère des Affaires municipales; gouvernement de Terre-Neuve; W.S. Deacon, agent de relations intergouvernementales, Bureau du Conseil exécutif, gouvernement du Yukon; George de Rappard, sous-ministre, Conseil exécutif, province du Manitoba; J.M. Fleming, directeur, Direction des services municipaux, Affaires municipales de l'Alberta; Dave Gairns, directeur des services municipaux, ministère des Affaires municipales et communautaires, gouvernement du Yukon; Gerald B. Hawkins, directeur, Services municipaux, ministère des affaires municipales, Nouveau-Brunswick; David W. Jennings, Directeur des relations de travail, Conseil du Trésor, gouvernement du Nouveau-Brunswick; Norm Macleod, chef, Division des affaires municipales, gouvernement local des Territoires du Nord-Ouest; Harry A. Nason, greffier du Conseil exécutif et secrétaire du Cabinet, gouvernement du Nouveau-Brunswick; John H. Parker, commissaire, gouvernement des Territoires du Nord-Ouest; Judith Robertson, conseiller en politique de gestion, Section de la gestion administrative, Direction de la politique de gestion municipale, ministère des Affaires municipales et du logement, gouvernement de l'Ontario; Marilyn T. Singer, secrétaire exécutive du ministre des Affaires municipales, province de la Nouvelle-Écosse; H.D. Spray, sous-ministre, Cabinet du Conseil exécutif, gouvernement du Yukon; Edward Stewart, greffier du Conseil exécutif, gouvernement de l'Ontario; David A. Vardy,

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greffier du Conseil exécutif et secrétaire du Cabinet, gouvernement de Terre-Neuve; Tor K. Veltheim, président, Commission de la Fonction publique de la Saskatchewan, gouvernement de la Saskatchewan; et Blenus Wright, sous-procureur général adjoint, ministère du Procureur général, gouvernement de l'Ontario.

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ANNEXE B

MINISTÈRES ET ORGANISMES GOUVERNEMENTAUX AYANT UN CODE D'ÉTHIQUE COMPLÉMENTAIRE

(Nota: Depuis que nous avons compilé les codes de ces ministères, la réorganisation du gouvernement a amené une intégration de certains d'entre eux.)

Administration des terres destinées aux anciens combattants, directeur
Administration du pipe-line du Nord
Administration du rétablissement agricole des Prairies
Agence d'examen de l'investissement étranger
Agence canadienne de développement international
Archives publiques du Canada
Bibliothèque nationale du Canada
Bureau des relations fédérales-provinciales
Bureau des services juridiques des pensions
Bureau du Conseil privé
Bureau du directeur des faillites
Bureau du vérificateur général du Canada
Cabinet du secrétaire du gouverneur général
Centre de la sécurité des télécommunications
Commission canadienne des droits de la personne
Commission canadienne des grains
Commission canadienne des pensions
Commission canadienne des transports
Commission canadienne du lait
Commission d'appel de l'immigration
Commission d'appel des pensions
Commission de contrôle de l'énergie atomique
Commission de la Capitale nationale
Commission de l'emploi et de l'immigration du Canada
Commission d'énergie du Nord canadien
Commission de réforme du droit du Canada
Commission de réforme du droit
Commission de révision de l'impôt (Cour canadienne de l'impôt)
Commission des allocations aux anciens combattants
Commission des pratiques restrictives du commerce
Commission des relations du travail dans la Fonction publique
Commission du tarif
Conseil consultatif de recherches sur les pêcheries et les océans
Conseil de la radiodiffusion et des télécommunications canadiennes
Conseil de recherches en sciences humaines du Canada
Conseil du Trésor (Bureau du Contrôleur général)
Conseil du Trésor (Secrétariat)
Conseil économique du Canada

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Cour Suprême, Personnel
Département d'Etat au développement économique
Département d'Etat aux sciences et à la technologie
Directeur de l'établissement des soldats
Gendarmerie royale du Canada (civils)
Greffier de la Cour fédérale du Canada
Ministère de la Consommation et des Corporations
Ministère de la Défense nationale (civils)*
Ministère de l'Agriculture
Ministère de la Justice
Ministère de la Santé et du Bien-être social
Ministère de l'Emploi et de l'Immigration
Ministère de l'Energie, des Mines et des Ressources
Ministère de l'Environnement
Ministère de l'Expansion économique régionale
Ministère de l'Industrie et du Commerce
Ministère d'Etat au développement social
Ministère des Affaires extérieures
Ministère des Affaires indiennes et du Nord
Ministère des Affaires des anciens combattants
Ministère des Approvisionnements et Services
Ministère des Communications
Ministère des Finances
Ministère des Pêches et des Océans
Ministère des Transports
Ministère des Travaux publics
Ministère du Revenu national (Douanes et Accise)
Ministère du Revenu national (Impôt)
Ministère du Solliciteur général Canada
Ministère du Travail
Musées nationaux du Canada
Office canadien des provendes
Office de répartition des approvisionnements d'énergie
Office des prix des produits de la pêche
Office national de l'énergie
Office national du film
Secrétariat d'Etat
Secrétariat des conférences intergouvernementales canadiennes
Service canadien des pénitenciers (Service correctionnel du Canada
Statistique Canada

*Le ministère de la Défense nationale a également un code complémentaire pour les membres des Forces armées canadiennes.

Sociétés de la Couronne ayant un code d'éthique complémentaire

Administration de la voie maritime du St-Laurent
Administration de pilotage des Laurentides
Air Canada
Banque du Canada
Banque fédérale de développement
Centre canadien d'hygiène et de sécurité du travail
Centre de recherches pour le développement international
Chemins de fer nationaux du Canada
Commission canadienne du blé
Commission d'énergie du Nord canadien
Commission des champs de bataille nationaux
Commission du port d'Oshawa
Conseil des arts du Canada
Construction de défense (1951) Limitée
Corporation commerciale canadienne
Corporation de disposition des biens de la Couronne
Corporation du Centre national des Arts
Corporation d'investissements au développement du Canada
Eldorado Nucléaire Limitée
Energie atomique du Canada Limitée
Office de commercialisation du poisson d'eau douce
Petro Canada
Ports Canada
Société canadienne des brevets et d'exploitation Limitée
Société canadienne d'hypothèques et de logement
Société de développement de l'industrie cinématographique canadienne
Société de développement du Cap Breton
Société des postes du Canada
Société du crédit agricole
Société pour l'expansion des exportations
Société Radio-Canada

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ANNEXE C

LÉGISLATION, LIGNES DE CONDUITE ET POLITIQUE EN MATIÈRE DE CONFLITS D'INTÉRÊTS

A. DISPOSITIONS DU CODE CRIMINEL

Article 108 - Corruption de fonctionnaires judiciaires, etc.

108. (1) Est coupable d'un acte criminel et passible d'un emprisonnement de quatorze ans, quiconque,

a) occupant une charge judiciaire ou étant membre du Parlement du Canada ou d'une législature, par corruption

i) accepte ou obtient,

ii) convient d'accepter, ou

iii) tente d'obtenir,

de l'argent, une contrepartie valable, une charge, une place ou un emploi pour lui-même ou pour une autre personne à l'égard d'une chose qu'il a faite ou omise ou qu'il doit faire ou omettre en sa qualité officielle; ou

b) donne ou offre, par corruption, à une personne qui occupe une charge judiciaire ou qui est membre du Parlement du Canada ou d'une législature, de l'argent, une contrepartie valable, une charge, une place ou un emploi à l'égard d'une chose qu'elle a accomplie ou omise ou qu'elle doit accomplir ou omettre, en sa qualité officielle, pour lui ou toute autre personne.

(2) Nulle procédure contre une personne qui occupe une charge judiciaire ne doit être intentée sous le régime du présent article sans le consentement écrit du procureur général du Canada.

Article 110 - Fraudes envers le gouvernement

110. (1) Commet une infraction, quiconque,

a) directement ou indirectement,

i) donne, offre ou convient de donner ou d'offrir à un fonctionnaire ou à un membre de sa famille ou à toute personne au profit d'un fonctionnaire, ou

ii) étant fonctionnaire, exige, accepte ou offre ou convient d'accepter de quelqu'un, pour lui-même ou

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un prêt, une récompense, un avantage ou un bénéfice de quelque nature que ce soit en considération d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou omission concernant

iii) la conclusion d'affaires avec le gouvernement ou un sujet d'affaires ayant trait au gouvernement, ou

iv) une réclamation contre Sa Majesté ou un avantage que Sa Majesté a l'autorité ou le droit d'accorder,

que, de fait, le fonctionnaire soit en mesure ou non de collaborer, d'aider, d'exercer une influence ou de faire ou omettre ce qui est projeté, selon le cas;

b) traitant d'affaires avec le gouvernement, paye une commission ou récompense ou confère un avantage ou un bénéfice de quelque nature à un employé ou fonctionnaire du gouvernement avec lequel il traite, ou à un membre de sa famille ou à toute personne au profit de l'employé ou fonctionnaire, à l'égard de ces relations d'affaires, à moins d'avoir obtenu, du chef de la division du gouvernement avec laquelle il traite, un consentement écrit dont la preuve lui incombe;

c) étant fonctionnaire ou employé du gouvernement, exige, accepte ou offre ou convient d'accepter d'une personne qui a des relations d'affaires avec le gouvernement une commission, une récompense, un avantage ou un bénéfice de quelque nature, directement ou indirectement, par lui-même ou par l'intermédiaire d'un membre de sa famille ou de toute personne à son profit, à moins d'avoir obtenu, du chef de la division de gouvernement qui l'emploie ou dont il est fonctionnaire, un consentement écrit dont la preuve lui incombe;

d) ayant ou présendant avoir de l'influence auprès du gouvernement ou d'un ministre du gouvernement, ou d'un fonctionnaire, exige, accepte ou offre ou convient d'accepter pour lui-même ou pour une autre personne une récompense, un avantage ou un bénéfice de quelque nature en considération d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou d'une omission concernant

i) une chose mentionnée au sous-alinéa a)(iii) ou (iv), ou

ii) la nomination d'une personne, y compris lui-même, à une charge;

e) offre, donne ou convient d'offrir ou de donner à un ministre du gouvernement ou à un fonctionnaire, une récompense, un avantage ou un bénéfice de quelque nature en considération d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou d'une omission concernant

i) une chose mentionnée au sous-alinéa a)(iii) ou (iv), ou

ii) la nomination d'une personne, y compris lui-même, à une charge; ou

f) ayant présenté une soumission en vue d'obtenir un contrat avec le gouvernement,

i) donne, offre ou convient de donner à une autre personne qui a présenté une soumission, ou à un membre de sa famille, ou à une autre personne à son profit, une récompense, un avantage ou un bénéfice de quelque nature en considération du retrait de la soumission de cette personne, ou

ii) exige, accepte ou convient d'accepter, d'une autre personne qui a présenté une soumission, une récompense, un avantage ou un bénéfice de quelque nature en considération du retrait de sa soumission.

(2) Commet une infraction, quiconque, afin d'obtenir ou de retenir un contrat avec le gouvernement, ou comme condition expresse ou tacite d'un tel contrat, directement ou indirectement souscrit, donne ou convient de souscrire ou de donner à quelque personne une contrepartie valable

a) en vue de favoriser l'élection d'un candidat ou d'un groupe ou d'une classe de candidats au Parlement du Canada ou à une législature, ou

b) avec l'intention d'influencer ou d'affecter de quelque façon le résultat d'une élection tenue pour l'élection de membres du Parlement du Canada ou d'une législature.

(3) Quiconque commet une infraction prévue au présent article est coupable d'un acte criminel et passible d'un emprisonnement de cinq ans.

Article 297 - Employé public qui refuse de remettre des biens

297. Est coupable d'un acte criminel et passible d'un emprisonnement de quatorze ans, quiconque, étant ou ayant été employé au service de Sa Majesté du chef du Canada ou d'une province, ou au service d'une municipalité, et chargé, en vertu de cet emploi, de

la réception, de la garde, de la gestion ou du contrôle d'une chose, refuse ou omet de remettre cette chose à une personne qui est autorisée à la réclamer et qui, effectivement, la réclame.

Article 357 - Faux relevé fourni par un fonctionnaire public

357. Est coupable d'un acte criminel et passible d'un emprisonnement de cinq ans, quiconque, étant chargé de la réception, garde ou gestion de quelque partie des revenus publics, fournit sciemment un faux état ou relevé

a) de deniers perçus par lui ou confiés à sa garde, ou

b) de tout solde de deniers entre ses mains ou sous son contrôle.

Article 682 - Vacance d'un poste public

682. (1) Tout emploi public, notamment une fonction relevant de la Couronne, devient vacant dès que son titulaire a été déclaré coupable d'un acte criminel et condamné en conséquence à un emprisonnement de plus de cinq ans.

(2) Tant qu'elle n'a pas subi la peine qui lui est infligée ou la peine y substituée par une autorité compétente ou qu'elle n'a pas reçu de Sa Majesté un pardon absolu, une personne visée par le paragraphe (1) est incapable d'occuper une fonction relevant de la Couronne ou un autre emploi public, ou d'être élue, de siéger ou de voter comme membre du Parlement du Canada ou d'une législature, ou d'exercer un droit de suffrage.

(3) Nulle personne déclarée coupable d'une infraction visée par l'article 119, ... n'a qualité, après cette déclaration de culpabilité, pour passer un contrat avec Sa Majesté ou pour recevoir quelque avantage en vertu d'un contrat entre Sa Majesté et toute autre personne ou pour occuper une fonction relevant de Sa Majesté.

(3.1) La personne visée au paragraphe (3) peut, avant que lui soit accordé le pardon prévu à l'article 4 de la Loi sur le casier judiciaire, demander au gouverneur en conseil d'être rétablie dans les droits dont elle est privée en application de ce paragraphe.

(3.2) Sur demande présentée conformément au paragraphe (3.1), le gouverneur en conseil peut ordonner que le demandeur soit rétabli dans tout ou partie des droits dont il est privé en application du paragraphe (3) aux conditions qu'il estime souhaitables dans l'intérêt public.

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B. INFRACTIONS CRIMINELLES EN VERTU D'AUTRES LOIS

1) Loi de 1976 sur l'immigration

Article 98 - Infractions relatives aux agents d'immigration et arbitres

98. Toute personne

a) qui, ayant la qualité d'agent d'immigration ou d'arbitre, établit ou délivre délibérément un document faux, fait à dessein une fausse déclaration dans une affaire entrant dans le cadre des fonctions que lui confère la présente loi, reçoit ou accepte de recevoir un pot-de-vin ou autre avantage dans le cadre d'une telle affaire ou encore incite ou encourage une personne à en accepter, ou manque délibérément aux obligations que lui impose la présente loi,

b) qui, ayant la qualité d'agent d'immigration ou d'arbitre, enfreint la présente loi ou les règlements, ou incite, aide ou encourage délibérément une autre personne à les enfreindre, ou fait des tentatives à cet effet,

c) qui donne, offre ou promet un pot-de-vin ou autre avantage quelconque à un agent d'immigration ou à un arbitre pour l'inciter de quelque manière à manquer aux obligations que la présente loi lui impose, ou conclut un accord ou un arrangement avec un tel fonctionnaire dans le même but,

d) qui se fait passer pour un agent d'immigration ou un arbitre ou adopte ou utilise un nom, un titre, un uniforme, des attributs ou une attitude susceptibles de faire accroire qu'elle est un agent d'immigration ou un arbitre, ou

e) qui gêne ou entrave l'action d'un agent d'immigration ou d'un arbitre dans l'exercice des fonctions que lui confère la présente loi,

commet une infraction et est passible,

f) sur déclaration de culpabilité par suite d'une procédure par voie d'acte d'accusation, d'une amende de dix mille dollars au maximum ou d'un emprisonnement d'une durée maximale de cinq ans, ou des deux peines à la fois, ou

g) sur déclaration sommaire de culpabilité, d'une amende de mille dollars au maximum ou d'un emprisonnement d'une durée maximale de six mois, ou des deux peines à la fois.

Article 99 - Cas non spécialement prévus

99. Toute violation de la présente loi ou des règlements, ordonnances et directives régulièrement établis sous son empire, pour laquelle aucune peine n'est prévue dans la présente loi, constitue, lorsqu'elle est commise sciemment, une infraction punissable, sur déclaration sommaire de culpabilité, d'une amende de mille dollars au maximum ou d'un emprisonnement d'une durée maximale de six mois ou des deux peines à la fois.

2) Loi sur l'administration financière, Partie XI

Article 92 - Infra tions

92. Tout fonctionnaire ou individu qui occupe quelque charge ou emploi se rattachant à la perception, à la gestion ou au déboursement de deniers publics, et qui

a) reçoit quelque rémunération ou récompense pour l'accomplissement d'un devoir de sa charge, sauf ce que prescrit la loi,

b) conspire ou agit collusoirement avec quelque autre personne dans l'intention de frauder Sa Majesté, ou fournit à quelque personne l'occasion de frauder Sa Majesté,

c) permet à dessein une contravention à la loi par quelque autre personne,

d) fait ou signe volontairement une fausse écriture dans un livre, ou fait ou signe volontairement un faux certificat ou rapport dans un cas où il est de son devoir de faire quelque écriture, certificat ou rapport,

e) ayant connaissance ou étant informé d'une contravention à une loi de revenu par quelque personne, ou d'une fraude commise par quelqu'un au préjudice de Sa Majesté, selon une loi de revenu du Canada, ne signale pas, par écrit, cette connaissance ou information à son supérieur, ou

f) exige ou accepte, ou cherche à percevoir directement ou indirectement, comme paiement ou don, ou autrement, quelque somme d'argent ou autre chose de valeur, à titre de compromis, arrangement ou règlement d'une accusation ou dénonciation de contravention ou de prétendue contravention à la loi,

est coupable d'un acte criminel et encourt, sur déclaration de culpabilité, une amende d'au plus cinq cents dollars et un emprisonnement durant au plus cinq ans.

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Article 93 - Corruption

93. Quiconque

a) promet, offre ou donne un présent à un fonctionnaire ou à une personne qui remplit une charge ou un emploi se rattachant à la perception, à la gestion ou au déboursement de deniers publics, dans le dessein

i) d'influencer sa décision ou sa conduite sur une question ou affaire alors pendante, ou qui, en vertu de la loi, peut lui être soumise en sa qualité officielle, ou

ii) d'incliner ce fonctionnaire ou cette personne à commettre, ou à aider ou assister à commettre, quelque fraude sur le revenu, ou à conniver à l'accomplissement d'une telle fraude, à y prendre une part collusoire, à la tolérer ou à en fournir l'occasion, ou

b) accepte ou reçoit un tel présent,

est coupable d'un acte criminel et encourt, sur déclaration de culpabilité, une amende n'excédant pas trois fois le montant ainsi offert ou accepté, et un emprisonnement durant au plus cinq ans.

3) Loi de 1971 sur l'assurance-chômage - Partie V

Article 114 - Caractère confidentiel des renseignements

114. Ne doivent avoir accès aux renseignements écrits ou verbaux obtenus de quiconque par la Commission en vertu de la présente loi ou d'un règlement y afférent que les employés de la Commission dans l'exercice de leurs fonctions et les autres personnes à qui elle juge souhaitable d'en permettre l'accès. Ni la Commission ni aucun de ses employés ne peuvent être contraints de répondre à une question concernant ces renseignements ni de produire des registres, documents ou autres pièces contenant ces renseignements à titre de preuve dans des procédures sans rapport direct avec l'exécution ou l'interprétation de la présente loi ou des règlements.

Article 123 - Violation de la loi

123. (1) Est coupable d'une infraction quiconque enfreint une disposition de la présente loi ou des règlements ou ne s'y conforme pas.

Article 124 - Infractions en général

124. Quiconque est coupable d'une infraction prévue par la présente loi et pour laquelle aucune pénalité n'est prévue est passible, sur déclaration sommaire de culpabilité, d'une amende de cinq cents dollars au plus ou d'un emprisonnement de six mois au plus ou de l'une et l'autre peine.

4) Loi de l'impôt sur le revenu - Partie XV

Article 241 - Communication des renseignements

241. (1) Sauf comme l'autorise le présent article, aucun fonctionnaire ni aucune personne autorisée ne doit

a) sciemment communiquer ni sciemment permettre que soit communiqué à quiconque un renseignement obtenu par le Ministre ou en son nom aux fins de la présente loi, ni

b) sciemment permettre à quiconque d'examiner tout livre, registre, écrit, déclaration ou autres documents obtenus par le Ministre ou en son nom aux fins de la présente loi, ou d'y avoir accès.

"(9) Quiconque,

a) étant un fonctionnaire ou une personne autorisée, contrevient aux dispositions du paragraphe (1), ou

b) à qui un renseignement a été fourni en conformité du paragraphe (4), qui utilise ce renseignement, le communique ou permet qu'il soit communiqué à toute fin autre que celle pour laquelle il a été fourni,

est coupable d'une infraction et passible sur déclaration sommaire de culpabilité d'une amende d'au plus $1,000 ou d'un emprisonnement d'au plus 2 mois, ou à la fois de l'amende et de l'emprisonnement."

C. RESPONSABILITÉ CIVILE EN VERTU DE CERTAINES LOIS

1) Loi sur l'administration financière, Partie XI

Article 89 - Avis aux personnes qui ne rendent pas des deniers publics

89. (1) Chaque fois que le receveur général a lieu de croire qu'une personne

a) a reçu des deniers pour Sa Majesté et ne les a pas dûment versés,

b) a reçu des deniers dont elle doit rendre compte à Sa Majesté et n'en a pas dûment rendu compte, ou

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c) a en main des deniers publics applicables à une fin quelconque et ne les y a pas dûment appliqués,

il peut faire signifier à cette personne ou, si elle est décédée, à son représentant, un avis lui enjoignant, dans le délai, après la signification de l'avis, que mentionne ce dernier, de verser dûment ces deniers, d'en rendre dûment compte ou de les appliquer de la manière voulue, selon le cas, et de transmettre au receveur général les pièces justificatives appropriées attestant qu'il en a été ainsi fait.

(2) Lorsqu'une personne a omis de se conformer à un avis qui lui a été signifié en vertu du paragraphe (1), dans le délai y fixé, le receveur général doit spécifier un compte entre cette personne et Sa Majesté, indiquant le montant d'argent qui n'a pas été dûment versé, dont il n'a pas été dûment rendu compte ou qui n'a pas été appliqué de la manière voulue, selon le cas, et, à la discrétion du receveur général, portant en totalité ou en partie un intérêt au taux de cinq pour cent l'an à compter de la date que détermine le receveur général, et, dans toutes procédures en recouvrement de cet argent, une copie du compte spécifié par le receveur général, qu'il a certifiée, constitue une preuve que le montant y énoncé, ainsi que les intérêts, sont dus et payables à Sa Majesté, sans preuve de la signature du receveur général ou de son caractère officiel, et sans autre preuve à cet égard, et ledit montant ainsi que les intérêts peuvent être recouvrés comme dette envers Sa Majesté.

Article 90 - Preuve

90. Lorsqu'il apparaît

a) des livres ou comptes tenus par une personne, ou dans le bureau d'une personne, employée à la perception ou gestion du revenu,

b) de tout compte rendu par cette personne, ou

c) de son admission écrite ou de son aveu écrit,

que cette personne, en vertu de sa charge ou de son emploi, a reçu de l'argent appartenant à Sa Majesté et a refusé ou négligé de le verser aux personnes voulues et aux époques réglementaires, un affidavit portant sur ces faits, souscrit par toute personne qui les connaît, constitue, dans les procédures en recouvrement de cet argent, une preuve des faits y énoncés.

Article 91 - Responsabilité des pertes

91. Si, en raison d'un acte illégal, d'une négligence volontaire de ses devoirs ou d'une insouciance flagrante par une personne employée à la perception ou réception de deniers publics, une somme d'argent se trouve perdue pour Sa Majesté, cette personne est responsable de la somme ainsi perdue comme si elle l'eût perçue et reçue, et ladite somme peut être recouvrée d'elle comme si elle l'avait perçue et reçue.

D. DISPOSITIONS LÉGISLATIVES PORTANT SUR LES CONFLITS D'INTÉRÊTS

1. Loi sur l'Office national de l'énergie

Voici le texte intégral du paragraphe 3(5) de la Loi sur l'Office national de l'énergie cité dans le rapport:

> Article 3(5) Une personne ne peut être nommée ni demeurer membre de l'Office si elle n'est pas un citoyen canadien ou si, en qualité de propriétaire, actionnaire, administrateur, fonctionnaire, associé ou d'autre façon, elle se livre à l'entreprise de production, vente, achat, transmission, exportation ou importation d'hydrocarbures ou de force motrice, ou si elle en pratique autrement le commerce, ou si elle détient quelque obligation, debenture ou autre titre d'une compagnie.

E. DISPOSITIONS RELATIVES AUX CONFLITS D'INTERETS DES PARLEMENTAIRES

1) Règlement de la Chambre des communes

Règle 14. Aucun député n'a le droit de voter sur une question dans laquelle il a un intérêt pécuniaire direct, et le vote de tout député ainsi intéressé doit être rejeté.

Règle 83. Le fait d'offrir de l'argent ou quelque autre avantage à un député à la Chambre des communes, en vue de favoriser toute opération pendante ou devant être conduite au Parlement, constitue un délit qualifié de "high crime and misdemeanour" et tend à la subversion de la Constitution.

Règle 84. S'il appert qu'une personne a été élue et déclarée élue député à la Chambre des communes, ou a cherché à l'être, par l'emploi de moyens de corruption ou d'autres tractations malhonnêtes, la Chambre usera de la plus grande rigueur envers tout individu qui aura volontairement pris part à ces manoeuvres.

2) Jurisprudence parlementaire de Beauchesne (1978).

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Article 824 - Offres d'argent

824. L'article 76 du Règlement est fondé sur une résolution adoptée par le Parlement d'Angleterre le 2 mai 1695. "Dans l'esprit de la présente résolution, l'offre d'argent en vue d'influer sur un député dans quelque délibération de la Chambre ou d'un comité a été considérée comme atteinte au privilège, car elle constitue une insulte, non seulement au député lui-même, mais aussi à la Chambre" (Sir Erskine May, Treatise on the Law, Privileges and Usage of Parliament, 19e édition, 1976, p. 149).

Article 825 - Acceptation d'argent o[illegible]onoraires

825. (1) L'article 108 du Code criminel (S.R.C. 1970, ch. C-34) réprime l'acceptation par le député d'une somme d'argent offerte en pot-de-vin.

(2) L'acceptation par les députés d'honoraires pour services professionnels reliés aux délibérations ou aux mesures du Parlement est aussi contraire à l'esprit de cette règle; l'usage parlementaire défend aussi à un député de donner, en qualité d'avocat-conseil rémunéré, un avis motivé sur tout bill privé dont le Parlement est saisi (Sir John Bourinot, Parliamentary Procedure and Practice in the Dominion of Canada, 4e édition, 1916, pp. 57 et 58).

Article 826 - Corruption électorale

826. Les articles 65 à 90 de la Loi électorale du Canada (S.R.C. 1970, ch. 14, 1er supp.) visent particulièrement tout ce qui touche à la corruption électorale.

3) Loi sur le Sénat et la Chambre des communes

Indépendance du Parlement
(La présente sous-section est connue également comme formant l'annexe 1 des Lignes directrices concernant les conflits d'intérêts à l'intention des ministres de la Couronne, annexe D, A. du présent rapport.)

Députés de la Chambre des communes

10. Sauf les dispositions spéciales qui suivent,

a) nulle personne qui, y ayant été nommée par la Couronne ou un fonctionnaire du gouvernement du Canada, accepte ou occupe une charge, une commission ou un emploi, d'une nature permanente ou temporaire, au service du gouvernement du Canada, comportant un traitement, des honoraires, gages, allocations, émoluments ou profits quelconques, et

b) nul shérif, registrateur des titres, greffier de la paix, ou procureur de la Couronne pour un comté de l'une des provinces du Canada,

ne peut être élu député à la Chambre des communes, ni ne peut y siéger ou y voter.

11. Rien à l'article 10 ne rend inéligible au poste de député à la Chambre des communes une personne qui, y ayant été nommée par la Couronne ou un fonctionnaire du gouvernement du Canada, occupe une charge, une commission ou un emploi d'une nature permanente ou temporaire au service du gouvernement du Canada, ni ne la rend inhabile à y siéger ou à y voter, si, par sa commission ou un autre acte de nomination, il est déclaré ou prescrit que cette personne occupe cette charge, cette commission ou cet emploi sans traitement et sans les honoraires, gages, allocations, émoluments ou autres profits quelconques qui y sont attachés.

12. Rien dans la présente loi ne rend une personne inéligible comme membre de la Chambre des communes ou ne la prive du droit d'y siéger ou d'y voter, du fait

a) qu'elle est un membre des forces de Sa Majesté tandis qu'elle est en activité de service par suite de la guerre, ou

b) qu'elle est un membre de la force de réserve des Forces canadiennes qui n'est pas en service à plein temps, autre que l'activité de service résultant de la guerre.

13. Nonobstant les dispositions de la présente loi, un député à la Chambre des communes ne doit pas abandonner son siège pour la seule raison qu'il a accepté une charge rémunératrice relevant de la Couronne, si cette charge en est une qui permet au titulaire d'être élu, ou de siéger ou de voter à la Chambre des communes.

14. Une personne ne devient pas, en vertu de la présente loi, inéligible à un poste de député à la Chambre des communes ou ne devient pas inhabile à siéger ou à voter à la Chambre des communes du seul fait qu'elle accepte le paiement de frais de voyage sur les deniers publics du Canada, lorsqu'elle voyage à la demande du gouverneur en conseil, pour les affaires publiques du Canada.

15. Un membre du Conseil privé de la Reine pour le Canada ne devient pas, aux termes de la présente loi, inéligible à un poste de député à la Chambre des communes ou ne devient pas inhabile à siéger ou à voter à la Chambre des communes du seul fait

a) qu'il occupe une charge comportant un traitement qui est prévu à l'article 4 de la Loi sur les traitements et qu'il touche ce traitement, ou

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b) qu'il est un ministre d'État autre qu'un ministre d'État prévu à l'article 5 de la Loi sur les traitements, ou un ministre sans portefeuille et qu'il touche un traitement afférent à ce poste,

s'il est élu pendant qu'il occupe cette charge ou ce poste ou s'il est député à la Chambre des communes à la date de sa nomination par la Couronne à cette charge ou à ce poste.

16. Est inéligible comme député à la Chambre des communes, et ne peut ni siéger ni voter dans ladite Chambre, quiconque a ou possède, entreprend ou exécute, directement ou indirectement, seul ou avec un autre, par lui-même ou par l'intermédiaire d'un mandataire ou d'un tiers, un contrat ou marché explicite ou implicite, avec ou pour le gouvernement du Canada au nom de la Couronne, ou avec ou pour quelqu'un des fonctionnaires du gouvernement du Canada, en vertu duquel des deniers publics du Canada doivent être payés.

17. Si un député à la Chambre des communes accepte une charge ou commission, ou s'il est partie ou s'intéresse à quelque contrat, marché, service ou ouvrage qui, en vertu de la présente loi, rend une personne inéligible ou inhabile à siéger ou à voter à la Chambre des communes, ou s'il vend sciemment des effets, denrées ou marchandises destinés au gouvernement du Canada ou à quelqu'un de ses fonctionnaires, ou accomplit quelque service pour lui ou pour eux, et pour lesquels il est payé ou il doit être payé des deniers publics du Canada, que ce contrat, ce marché ou cette vente soit explicite ou implicite, et que l'opération soit isolée ou continue, son siège est de ce fait déclaré vacant, et son élection est dès lors nulle.

18. (1) Si une personne inéligible comme député à la Chambre des communes, ou déclarée par la présente loi inhabile à y siéger ou à y voter, ou si quelque personne dûment élue, qui est devenue inhabile à continuer de remplir son mandat, ou de siéger ou de voter, aux termes de l'article 17, y siège ou y vote ou persiste à y siéger ou à y voter, nonobstant cette inhabilité, elle est passible de ce chef d'une amende de deux cents dollars pour chaque jour où elle a ainsi siégé ou voté.

(2) Cette somme peut être recouvrée de cette personne par quiconque en poursuit le recouvrement devant toute cour de juridiction civile compétente au Canada.

19. Les articles 16, 17 et 18 s'étendent à tout marché, opération ou acte commencé et terminé durant une vacance du Parlement.

20. (1) Dans tout contrat ou marché fait ou conclu avec le gouvernement du Canada, ou avec quelqu'un des fonctionnaires ou ministères du gouvernement du Canada, et dans toute commission acceptée par qui que ce soit de leur part, il est inséré une

condition formelle et explicite qu'aucun député à la Chambre des communes n'est admis à être partie à ce contrat, à ce marché ou à cette commission, ni à participer à aucun des bénéfices ou profits qui en proviennent.

(2) Si une personne qui a conclu ou accepté ou qui conclut ou accepte un contrat, un marché ou une commission de ce genre, admet un ou des députés à la Chambre des communes à y avoir part ou à participer aux bénéfices ou profits qui en résultent, cette personne est passible, pour chaque contravention, d'une amende de deux mille dollars, recouvrable avec dépens dans toute cour compétente, par quiconque en poursuit le recouvrement.

21. La présente loi ne va pas jusqu'à rendre inéligible au poste de député à la Chambre des communes,

a) un actionnaire d'une compagnie constituée en corporation qui a un contrat ou un marché avec le gouvernement du Canada, à l'exception d'une compagnie qui entreprend l'exécution de travaux publics;

b) une personne à qui incombe le parachèvement d'une entreprise ou d'un marché explicite ou implicite, par voie de transmission ou pour cause d'expiration de délai, ou par mariage, ou à titre d'héritier, de légataire, d'exécuteur testamentaire ou d'administrateur, avant qu'il se soit écoulé douze mois depuis la date à laquelle cette charge lui est dévolue; ou

c) un entrepreneur de prêts d'argent, ou de titres pour le paiement d'argent, au gouvernement du Canada, d'autorité du Parlement, à la suite d'adjudication publique, ou concernant l'achat ou le paiement de fonds ou obligations publiques du Canada, à des conditions égales pour tous.

Membres du Sénat

22. (1) Nul membre du Sénat ne doit, ni directement ni indirectement, sciemment et volontairement, être partie à un contrat, ni intéressé dans un contrat, pour l'exécution duquel des deniers publics du Canada sont payables.

(2) Si un membre du Sénat devient sciemment et volontairement partie à ce contrat ou intéressé dans ce contrat, il est passible d'une amende de deux cents dollars pour chaque jour où il continue d'être ainsi partie à ce contrat ou intéressé dans ce contrat.

(3) Cette somme peut être recouvrée de lui par quiconque en poursuit le recouvrement devant une cour compétente au Canada.

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(4) Le présent article ne rend pas un sénateur passible de cette amende parce qu'il est actionnaire d'une compagnie constituée en corporation qui a un contrat ou un marché avec le gouvernement du Canada, à moins que cette compagnie n'entreprenne l'exécution de travaux publics.

(5) Le présent article ne rend pas un sénateur passible desdites amendes, du fait que ce sénateur est ou a été un entrepreneur de prêts d'argent, ou de titres pour le paiement d'argent, au gouvernement du Canada, d'autorité du Parlement, à la suite d'adjudication publique, ou du fait que ce sénateur est ou a été un entrepreneur concernant l'achat ou le paiement de fonds ou obligations publiques du Canada, à des conditions égales pour tous.

Membres du Senat et de la Chambre des communes

23. (1) Il est interdit à un membre du Sénat ou à un député à la Chambre des communes de recevoir, ou convenir de recevoir, directement ou indirectement, une rémunération pour services rendus ou à rendre à quelqu'un, soit par lui-même, soit par un tiers, relativement à quelque projet de loi, délibération, contrat, réclamation, dispute, accusation, arrestation ou autre affaire, devant le Sénat ou devant la Chambre des communes ou devant un comité de l'une ou de l'autre Chambre, ou pour influencer ou tenter d'influencer quelque membre de l'une ou de l'autre Chambre.

(2) Tout membre du Sénat qui contrevient au présent article est passible d'une amende d'au moins mille dollars et d'au plus quatre mille dollars; et tout député à la Chambre des communes qui contrevient au présent article est passible d'une amende d'au moins cinq cents dollars et d'au plus deux mille dollars, et durant cinq années après avoir été déclaré coupable de pareille contravention, il est inhabile à être député à la Chambre des communes et à occuper une charge dans la fonction publique du Canada.

(3) Quiconque donne, offre ou promet à un semblable membre du Sénat ou député à la Chambre des communes quelque rémunération pour pareils services rendus ou à rendre, est coupable d'un acte criminel et passible d'un emprisonnement d'un an et d'une amende d'au moins cinq cents dollars et d'au plus deux mille dollars.

Prescriptions des actions

24. Nul n'est passible d'une amende ou peine imposée par la présente loi, à moins que des procédures n'aient été intentées pour la recouvrer dans les douze mois après que cette amende ou peine à été encourue.

F. DISPOSITIONS DE LA LOI SUR L'EMPLOI DANS LA FONCTION PUBLIQUE

Activités politiques

32. (1) Il est interdit à tout sous-chef et, sauf selon que l'autorise le présent article, à tout employé

a) de travailler pour ou contre un candidat à une élection à la Chambre des communes, à la Législature d'une province ou au Conseil du territoire du Yukon ou des territoires du Nord-Ouest, ou de travailler au nom d'un tel candidat, ainsi que de travailler pour ou contre un parti politique ou de travailler au nom d'un tel parti; ou

b) d'être candidat à une élection mentionnée à l'alinéa a).

(2) Une personne ne contrevient pas au paragraphe (1) pour le seul motif qu'elle assiste à une réunion politique ou qu'elle verse, à titre de contribution, de l'argent pour la caisse d'un candidat à une élection mentionnée à l'alinéa (1)a) ou qu'elle verse de l'argent à la caisse d'un parti politique.

(3) Nonobstant toute autre loi, sur demande que lui a présentée un employé, la Commission peut, si elle est d'avis que, par rapport à la Fonction publique, l'efficacité de l'employé, dans le poste qu'il occupe alors, n'aura pas à souffrir du fait qu'il aura été candidat à une élection mentionnée à l'alinéa (1)a), accorder à l'employé un congé sans traitement pour lui permettre de demander à se faire présenter comme candidat et d'être candidat à cette élection, pour une période se terminant le jour où les résultats de l'élection sont officiellement déclarés ou à la date antérieure comme peut le demander l'employé s'il a cessé d'être un candidat.

(4) Dès qu'elle a accordé un congé en vertu du paragraphe (3), la Commission doit faire publier un avis à ce sujet dans la Gazette du Canada.

(5) Un employé déclaré élu à une élection décrite à l'alinéa (1)a) cesse dès lors d'être un employé.

(6) Lorsqu'une personne qui est ou a été candidat à une élection décrite à l'alinéa (1)a) allègue à la Commission qu'un sous-chef ou un employé a contrevenu au paragraphe (1), l'allégation doit être déférée à un comité établi par la Commission pour tenir une enquête au cours de laquelle la personne qui fait l'allégation et le sous-chef ou l'employé en cause ou leurs représentants ont la possibilité de se faire entendre. Après avoir été informé de la décision du comité en ce qui concerne l'enquête, la Commission

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a) doit, lorsqu'il s'agit d'un sous-chef, soumettre la décision au gouverneur en conseil qui peut, si le comité a décidé que le sous-chef a contrevenu aux dispositions du paragraphe (1), destituer ce sous-chef; et

b) peut, lorsqu'il s'agit d'un employé, si le comité a décidé que l'employé a contrevenu aux dispositions du paragraphe (1), destituer cet employé.

(7) Pour l'application du paragraphe (6), l'expression "sous-chef" ne comprend pas une personne, pour laquelle la destitution, autrement que par cessation des fonctions auxquelles elle a été nommée à titre amovible, est expressément prévue par la présente loi ou quelque autre loi.

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ANNEXE D

A. LIGNES DIRECTRICES CONCERNANT LES CONFLITS D'INTÉRÊTS A L'INTENTION DES MINISTRES DE LA COURONNE

I. Principes

1) Il incombe à chaque ministre d'éviter les conflits d'intérêts réels, apparents ou prévisibles.

2) Les ministres doivent exercer et sembler exercer leurs fonctions officielles de même qu'organiser leurs affaires personnelles de façon à conserver et rehausser la confiance que le public accorde au gouvernement et à éviter tout conflit d'intérêts.

3) Les ministres ne doivent pas tirer parti ou sembler tirer parti de leurs fonctions officielles ou des renseignements qui leur sont communiqués dans l'exercice de ces fonctions et qui ne sont pas, en général, divulgués publiquement.

Les présentes lignes directrices ont pour objet d'aider les ministres à observer ces principes et à toujours avoir la conduite irréprochable que l'on attend d'eux. Comme elles sont d'ordre général, leur seul respect n'offre peut-être pas une protection totale aux ministres. Aussi, ces derniers doivent-ils prendre toutes les mesures supplémentaires qui s'imposent pour éviter tout conflit d'intérêts.

II Activités prohibées

À leur nomination, ou dans les plus brefs délais après leur nomination, les ministres doivent cesser:

1) de pratiquer leur profession ou de gérer ou exploiter une entreprise ou un commerce, ou de gérer des biens, à l'exception des biens exemptés ou pouvant être divulgués;

2) d'agir comme conseiller rémunéré;

3) de conserver ou d'accepter un poste d'administrateur ou une charge dans une société commerciale. Même si dans certaines circonstances il peut être bon qu'un ministre conserve ou accepte un poste d'administrateur ou une charge dans des

organismes philanthropiques ou de charité, il doit toujours prendre soin d'éviter les conflits d'intérêts et refuser les postes ou charges qui lui sont offerts dans les organismes du genre qui reçoivent des subventions fédérales;

4) d'être membre actif d'un syndicat ou d'un organisme professionnel.

Les ministres sont tenus de fournir au sous-registraire général adjoint (SRGA) une déclaration, qui sera portée au Registre public, de tout renseignement sur les liens de participation qu'ils ont entretenus et les postes qu'ils ont occupés, pendant les deux années qui ont précédé leur nomination, au sein d'un conseil d'administration et en tant que cadre supérieur d'une société. Leur déclaration devra être suffisamment explicite pour permettre de connaître la nature de l'entreprise et des fonctions en cause.

III Refus de tout traitement de faveur

Les ministres ne doivent accorder aucun traitement de faveur, relativement à des questions officielles, à des parents ou des amis, ou à des organismes dans lesquels ces parents ou amis ont des intérêts.

Les ministres doivent également éviter de se placer dans une situation où ils sont, ou peuvent sembler être, redevables à une personne ou un organisme qui pourrait tirer parti d'un traitement de faveur de leur part.

IV Cadeaux

Les ministres doivent faire une déclaration publique sur tous les cadeaux personnels ou autres avantages d'une valeur supérieure à deux cent dollars qu'ils ont reçus de personnes n'ayant aucun lien de filiation, de mariage ou d'adoption, en indiquant le nom et l'adresse du donateur. Ils ne sont pas tenus de faire de déclaration sur les cadeaux officiels ni l'hospitalité reçus de pays étrangers non plus que sur l'hospitalité qui leur est accordée par des amis personnels. Tout cadeau ou avantage d'une valeur supérieure à deux cent dollars, autre que les cadeaux et avantages officiels, doit être déclaré, dans les trente jours qui suivent sa réception, au SRGA qui en fera rapport dans le Registre public.

V Dispositions relatives aux biens

À leur nomination au Cabinet ou au moment où les présentes lignes directrices entreront en vigueur, les ministres doivent présenter au Premier ministre, par l'intermédiaire du sous-registraire général adjoint, un rapport complet de tous leurs

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biens et exigibilités. Ces rapports feront l'objet d'une révision annuelle que les ministres présenteront par les mêmes voies, et qui indiqueront tous les changements pertinents touchant les biens, autres que les biens exemptés, qu'ils détiennent personnellement. Ces rapports annuels feront aussi état de toute modification aux exigibilités du ministre.

A) Biens exemptés

Les biens personnels des ministres et de leur famille et les biens n'ayant aucun caractère commercial ne sont assujettis à aucune divulgation publique ou restriction ("biens exemptés"). Ces biens comprennent: les domiciles principaux et secondaires réservés à l'usage personnel, présent ou futur, des ministres et de leur famille; les articles ménagers et les effets personnels; les automobiles, bateaux et autres moyens de transport à usage personnel; les oeuvres d'art; les liquidités et dépôts (mais non les liquidités et dépôts en devises étrangères détenus en vue d'investissements ou à des fins de spéculation); les obligations d'épargne du Canada et des provinces; les montants investis au titre d'un régime enregistré non autogéré d'épargne-retraite, ou d'un régime enregistré autogéré composé exclusivement de biens exemptés et au titre d'un régime enregistré d'épargne-logement; les investissements dans des sociétés de placements garantis et autres instruments financiers semblables; les contrats de rente à versements invariables et les autres rentes; les droits courus à la pension de retraite; les polices d'assurance-vie; les créances à recouvrer d'un ancien employeur, client ou associé; les prêts consentis à des personnes unies aux ministres par des liens de filiation, de mariage ou d'adoption, et les prêts inférieurs à $5,000 consentis à d'autres personnes.

B) Biens pouvant être divulgués

Les ministres peuvent décider de faire une déclaration, qui sera portée au Registre public, relative à leurs biens lorsque, en raison de leur nature, lesdits biens ne risquent pas de présenter de conflit d'intérêts, c'est-à-dire une déclaration relative:

1) aux intérêts détenus dans une entreprise familiale et dans les sociétés dont les valeurs ne sont pas cotées à la bourse, qui ne sont pas liées par contrat avec le gouvernement fédéral, qui sont d'intérêt local et qui ne possèdent ni ne contrôlent des titres de sociétés publiques;

2) à la propriété d'exploitations agricoles;

3) aux biens immobiliers autres que les biens exemptés qui ne servent habituellement pas à l'usage personnel du ministre ou de sa famille et qui ne risquent pas de susciter un conflit d'intérêt;

4) à l'usufruit de biens placés en fiducie, autre qu'un fonds fiduciaire sans droit de regard, dont la gestion est libre de tout lien de dépendance.

Si les ministres décident de ne pas déclarer les biens qui ne présentent pas de risques de conflits d'intérêts, ces derniers sont considérés comme des "biens réglementés". Dans les soixante jours qui suivent sa nomination du cabinet, le ministre doit faire un premier rapport au SRGA qui portera les renseignements au Registre public. Il doit cependant informer le SRGA, dans les trente jours qui suivent la transaction, de toute vente, achat ou acquisition par d'autres moyens de biens de cette nature effectués après la première déclaration, pour que cette transaction soit portée au Registre public. Les renseignements fournis dans ces déclarations pourront être consultés par le public.

C) Biens réglementés

Tous les biens d'un ministre autres que ceux mentionnés ci-dessus seront considérés comme des biens réglementés et devront être soit vendus dans une transaction normale sans lien de dépendance, soit confiés à un fonds fiduciaire sans droit de regard. Les ministres ne peuvent, une fois les dispositions prises pour se conformer aux lignes directrices, acheter, vendre ou conserver un intérêt direct dans des biens réglementés. S'ils devaient acquérir de tels biens à la suite d'un héritage ou d'un cadeau, ils sont tenus d'en faire rapport au Premier ministre et de les vendre ou les placer dans un fonds fiduciaire sans droit de regard.

Les biens réglementés comprennent ce qui suit:

1) valeurs cotées en bourse de sociétés et de gouvernements;

2) intérêts dans une société en nom collectif, une entreprise personnelle, une entreprise en coparticipation, une société privée et une entreprise familiale qui ne constituent pas des "biens pouvant être divulgués";

3) options d'achat d'actions, sauf celles de sociétés privées mentionnées au point 1) du paragraphe intitulé "Biens pouvant être divulgués";

4) prestations versées à des régimes enregistrés d'épargne-retraite autogérés, sauf ceux qui sont composés exclusivement de biens exemptés;

5) biens immobiliers qui ne constituent pas des biens exemptés ou pouvant être divulgués;

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6) tout autre bien, y compris les métaux, et toute devise étrangère, destinés à des fins de spéculation ou d'investissement;

7) intérêts dans des régimes de participation aux bénéfices;

8) prêts excédant $5,000 consentis à des personnes n'ayant aucun lien de filiation, de mariage ou d'adoption avec le ministre.

1) Dessaisissement par vente

Les ministres peuvent vendre des biens réglementés au moyen d'une transaction normale sans lien de dépendance, mais seulement en vue de se conformer aux présentes lignes directrices et dans les délais qui y sont prescrits.

2) Dessaisissement - Fiducie sans droit de regard

Les biens réglementés qui ne sont pas vendus doivent être confiés à un fonds fiduciaire sans droit de regard. Les critères suivants s'appliquent aux placements sans droit de regard effectués en conformité avec les présentes lignes directrices:

1) les titres de tous les biens confiés à un fonds fiduciaire doivent être transférés aux fiduciaires;

2) les fiduciaires d'un tel fonds seront des particuliers, des sociétés ou des firmes qui n'ont aucun lien de dépendance avec les ministres (comme l'entend la Loi canadienne de l'impôt sur le revenu en parlant de l'administration "à distance"), ce qui exclut toutes les personnes qui leur sont unies par des liens de filiation, de mariage ou d'adoption;

3) bien que le nombre des fiduciaires ne soit soumis à aucune restriction, chaque fonds fiduciaire doit compter au moins un "fiduciaire désigné par le gouvernement" (toute compagnie de fiducie détenant un permis valide ainsi que les courtiers en investissement désignés);

4) les décisions prises par les fiduciaires d'une fiducie sans droit de regard doivent recevoir l'approbation de la majorité des fiduciaires, y compris du fiduciaire désigné par le gouvernement;

5) sous réserve des exigences formulées aux paragraphes 2, 3 et 4 ci-dessus, le ministre peut nommer autant de fiduciaires indépendants qu'il le désire;

6) il devra être établi clairement dans les conditions afférentes à l'instrument de fiducie que le fiduciaire ne devra divulguer au ministre ou lui révéler, sous une forme ou une autre, directement ou indirectement, quelque question que ce soit relative aux biens qui lui ont été confiés ou qu'il administre, sauf de la manière prescrite ci-après;

7) tout fiduciaire doit être habilité à prendre ses décisions concernant la gestion des biens qui lui sont confiés en toute liberté, sans intervention directe ou indirecte du ministre et sans information et consultation préalables de ce dernier;

8) l'instrument de fiducie doit stipuler que les fiduciaires sont tenus de fournir au ministre une déclaration annuelle de revenus pour les besoins du fisc, en conformité avec tout autre loi ou règlement pertinent;

9) l'instrument de fiducie peut autoriser la divulgation au ministre de la valeur totale des fonds placés en fiducie à n'importe quel moment, mais ces renseignements de même que les déclarations mentionnées au paragraphe 8 ci-dessus ne doivent révéler ni la forme, ni la nature, ni la valeur particulière des biens placés en fiducie;

10) les conditions afférentes à l'instrument de fiducie sans droit de regard peuvent prévoir le versement au ministre du revenu net du fonds aux intervalles qu'il pourra décider avec le fiduciaire;

11) le ministre peut exiger que le fiduciaire lui verse une partie du capital dudit fonds, en numéraire et non en titres, de la façon qui lui convient;

12) le bénéficiaire peut grossir le compte fiduciaire en tout temps.

NOTE: Les ministres peuvent nommer des personnes autres qu'eux-mêmes comme bénéficiaires de leur fiducie sans droit de regard; le cas échéant, les critères énoncés ci-dessus s'appliquent mutatis mutandis aux ministres et aux bénéficiaires.

Le ministre doit faire parvenir au sous-registraire général adjoint, dans les délais fixés dans les présentes lignes directrices, un exemplaire de l'instrument de fiducie établi conformément aux présentes.

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Le Premier ministre peut prolonger ce délai dans des cas particuliers.

3) Sociétés de portefueille

Lorsque les ministres ont établi des sociétés de portefeuille à des fins de planification testamentaire, ils peuvent déposer les droits qu'ils possèdent dans une telle société dans un fonds fiduciaire. Dans un tel cas, le fiduciaire ne peut pas se départir des droits placés dans ce fonds ni les modifier d'aucune autre façon. Le sous-registraire général adjoint peut agir à titre de fiduciaire de ce fonds.

Lorsqu'ils établissent de tels fonds fiduciaires, les ministres peuvent prendre des dispositions pour qu'une tierce partie exerce leur droit de vote relativement à leurs intérêts dans ladite société de portefeuille, pourvu que ces dispositions n'entraînent pas de conflits d'intérêts. Les ministres qui ont établi de tels comptes fiduciaires ne peuvent pas être consultés au sujet de la disposition des biens détenus par la société de portefeuille qui constitueraient des biens réglementés en vertu des conditions des présentes lignes directrices, ni en être informés.

VI Testaments et fiducies

Les ministres doivent divulguer au Premier ministre, par l'intermédiaire du SRGA, tous les fonds dont ils sont responsables à titre d'exécuteur testamentaire ou de fiduciaire et ils doivent prendre les mesures appropriées pour éviter les conflits d'intérêts que pourraient présenter de tels droits et fonctions.

VII Conjoints et enfants à charge

Les présentes lignes directrices ne s'appliquent pas directement aux conjoints ou aux enfants à charge des ministres, mais il va sans dire que ces derniers ne doivent pas leur transférer leurs biens pour se soustraire aux exigences desdites lignes directrices. Les ministres doivent également prendre les moyens pour éviter les conflits d'intérêts comme ceux auxquels pourraient donner ou paraître donner lieu certains biens ou investissements que leurs conjoints ou enfants à leur charge possèdent ou gèrent, en partie ou en totalité.

VIII Administration

Le sous-registraire général adjoint (SRGA) est chargé de l'application des présentes lignes directrices au nom du Premier ministre. Le SRGA aidera les ministres à les respecter et leur fournira toute l'information et les conseils nécessaires à cette fin.

Les ministres doivent divulguer au SRGA, à titre confidentiel, tous leurs biens, redevances et activités, y compris les testaments et les fiducies dont ils sont responsables, dans les 60 jours qui suivent leur nomination au Cabinet ou l'entrée en vigueur des présentes lignes directrices.

Pour s'assurer que l'instrument de fiducie est conforme aux critères établis dans les lignes directrices et aux exigences du Premier ministre, les ministres devront le soumettre au préalable au SRGA.

Les ministres doivent prendre leurs dispositions pour se conformer aux lignes directrices dans les 120 jours qui suivent leur nomination ou l'entrée en vigueur des présentes lignes directrices. Dans ce délai, ils devront fournir au SRGA copie des instruments de fiducie sans droit de regard dûment exécutés et remplir une formule de déclaration, pour faire connaître, conformément aux exigences, leurs activités antérieures, les cadeaux ou avantages personnels dont ils ont bénéficié ainsi que les biens pouvant être divulgués; ils devront en outre produire un document attestant les mesures prises pour se conformer aux lignes directrices. Tous ces documents, sauf l'instrument de fiducie, seront accessibles au public dans le Registre public au SRGA.

Si l'application des directives pose des problèmes que le SRGA ne peut résoudre avec un ministre, la question sera soumise par l'un ou l'autre à un comité consultatif composé du greffier du Conseil privé et du premier secrétaire du Premier ministre. Les questions relatives à l'application des lignes directrices dans des situations spéciales seront transmises au Premier ministre par l'entremise du comité consultatif.

Les dispositions prises par un ministre relativement aux conflits d'intérêts ne seront valides qu'une fois approuvées par le Premier ministre.

IX Autres exigences

Règlements à l'intention des parlementaires concernant les conflits d'intérêts

Les ministres sont tenus de respecter non seulement les présentes lignes directrices mais également les dispositions de la Loi sur le Sénat et la Chambre des communes qui s'appliquent aux conflits d'intérêts (voir annexe I).* Ces dispositions traitent des charges incompatibles, de l'interdiction de participer à des marchés de l'Etat et de percevoir une rémunération pour influencer d'autres parlementaires.

*Elles sont reproduites à la partie E(3) de l'annexe C du rapport.

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Lignes directrices concernant les emplois ultérieurs à une charge publique

Les ministres sont également tenus de se conformer aux lignes directrices concernant les emplois ultérieurs à une charge publique qui figurent à l'annexe II.*

*Elles sont reproduites à la partie B de la présente annexe.

B. EMPLOIS ULTÉRIEURS À UNE CHARGE PUBLIQUE

A. Lignes directrices à l'intention des ministres

1) Les ministres ne doivent pas se laisser influencer dans l'exercice de leurs fonctions officielles par des perspectives ou des offres d'emploi émanant de l'extérieur du gouvernement:

a) ils doivent divulguer au Premier ministre toutes les offres sérieuses d'emploi émanant de l'extérieur du gouvernement qui, à leur avis, les placent dans une situation réelle ou apparente de conflit d'intérêts;

b) ils doivent informer le Premier minitre de toute offre d'emploi émanant de l'extérieur du gouvernement qu'ils auraient l'intention d'accepter;

c) ils doivent, lorsqu'ils cherchent un emploi à l'extérieur du gouvernement ou envisagent de se lancer dans des activités commerciales après leur départ de la fonction publique, s'assurer que leurs initiatives ne mèneront pas à des conflits d'intérêts réels ou apparents et ne nuiront d'aucune façon à leurs fonctions officielles.

2) Les ministres doivent s'assurer, dans tous les rapports qu'ils entretiennent avec d'anciens titulaires de charges publiques, que leur conduite ne donne pas à penser ni même à soupçonner qu'ils participent à un trafic d'influence à l'octroi de passe-droits ou de traitements de faveur.

B. Lignes directrices concernant les emplois et les activités commerciales ultérieurs des ministres

Les lignes directrices suivantes se fondent sur les principes énoncés dans les lignes directrices concernant les conflits d'intérêts. Leur application doit être conforme à ces principes et viser à protéger le plus possible la liberté individuelle des anciens ministres.

Ces lignes directrices ne s'appliquent pas aux anciens ministres qui demeurent sénateurs ou députés dans la mesure où elles feraient obstacle à l'exécution de leurs fonctions parlementaires; dans ces circonstances, toutefois, l'ancien ministre doit prendre soin de se conformer aux lois, règles et conventions du Parlement relatives aux conflits d'intérêts.

1) Au cours des deux années suivant son départ du ministère, un ministre ne doit pas:

a) accepter un siège au conseil d'administration d'une société commerciale qui entretenait des rapports particuliers habituels avec le ministère ou l'organisme dont il était responsable en permanence, dans les deux dernières années de son mandat;

b) faire volte-face pour agir au nom ou à la place d'une personne où d'une société commerciale dans une procédure, transaction, cause ou autre affaire à laquelle le gouvernement du Canada est partie et à laquelle lui-même a eu l'occasion de représenter le gouvernement, dans les deux dernières années de son mandat;

c) exercer des pressions en faveur ou au nom d'une personne ou d'une société commerciale auprès du ministère ou de l'organisme dont il était responsable en permanence, dans les deux dernières années de son mandat.

2) Dans l'année suivant son départ du ministère, un ministre ne doit pas:

a) accepter un emploi dans une société commerciale avec laquelle il entretenait d'importants rapports officiels, en tant que ministre, au cours de la dernière annéee de son mandat;

b) faire volte-face pour agir au nom ou à la place d'une personne ou d'une société commerciale dans une procédure, cause, transaction, ou autre affaire qui relevait de sa compétence, au cours de la dernière année de son mandat;

c) donner des conseils à des fins commerciales sur les programmes ou politiques du ministère ou de l'organisme dont il était responsable en

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permanence ou avec lequel il entretenait d'importants rapports officiels, au cours de la dernière année de son mandat.

NOTE: Dans les présentes lignes directrices, "ministère ou organisme" comprend les sociétés de la Couronne, mais non les organismes quasi judiciaires. L'expression "rapports particuliers" dont il est fait mention à l'alinéa la) signifie que la société était assujettie à un contrôle de ses activités par le ministère ou l'organisme, qu'elle recevait de ceux-ci des subventions, prêts ou autre forme d'aide financière ou qu'elle entretenait avec eux des rapports contractuels.

C. LIGNES DIRECTRICES À L'INTENTION DES SECRÉTAIRES PARLEMENTAIRES

Voici le texte de la lettre du Premier ministre destinée aux secrétaires parlementaires:

> Je voudrais porter à votre attention l'importance que le gouvernement accorde à la question des conflits d'intérêts et vous faire connaître notre politique en cette matière pour ce qui est des secrétaires parlementaires.
>
> Le principe fondamental de notre politique est que la probité et l'objectivité de toutes les personnes ayant des charges publiques doivent toujours être au-dessus de tout soupçon. Chacun d'entre nous doit donc se faire un devoir d'éviter scrupuleusement toute transaction financière ou activité rémunérée qui pourrait lui apporter des avantages injustifiés ou le placer dans une situation de conflit d'intérêts réel ou apparent.
>
> Le gouvernement a formulé des lignes directrices sévères à l'intention des ministres et des personnes nommées à plein temps par le gouverneur en conseil qui exercent diverses fonctions d'administration et de direction.
>
> Compte tenu de la grande variété de fonctions qui peuvent incomber à chaque secrétaire parlementaire, le gouvernement a décidé de ne pas établir de régime détaillé et global relatif aux conflits d'intérêts pour ces derniers en tant que groupe. Par conséquent, il est d'autant plus important que chaque secrétaire parlementaire examine régulièrement ses propres fonctions et veille à ce qu'elles ne laissent place à aucune possibilité de conflit d'intérêts, réel ou apparent, ou d'avantages injustifiés. Je vous invite à discuter avec

votre ministre de toute question qui pourrait susciter des problèmes, afin d'éviter tout malentendu.

Les secrétaires parlementaires sont invités à respecter certaines lignes directrices en ce qui concerne leurs activités lorsqu'ils résignent leurs fonctions ou envisagent de le faire. Ces lignes directrices visent à éviter que l'on puisse soupçonner les secrétaires parlementaires de se servir de leur ancien poste d'une façon qui pourrait nuire à l'objectivité et au désintéressement du service gouvernemental. Je vous saurais gré d'agir conformément à ces lignes directrices lorsque vous cesserez d'occuper vos fonctions de secrétaire parlementaire.

Enfin, je voudrais porter à votre attention les dispositions de la Loi sur le Sénat et la Chambre des communes concernant cette question, surtout celles qui traitent des charges incompatibles, de l'interdiction de participer à des marchés de l'Etat et de l'interdiction de percevoir une rémunération pour influencer d'autres parlementaires. Je vous incite également à lire attentivement le projet de loi C-6, Loi sur l'indépendance du Parlement, qui proposait à l'intention des députés et sénateurs un régime global relatif aux conflits d'intérêts, projet de loi qui a passé l'étape de la deuxième lecture en 1979 mais n'a pas été adopté par le Parlement, ainsi que le compte rendu des débats qui ont entouré la deuxième lecture de ce projet. Ces documents devraient vous aider à évaluer votre situation personnelle.

D. LIGNES DIRECTRICES CONCERNANT LES EMPLOIS ULTÉRIEURS DES SECRÉTAIRES PARLEMENTAIRES

A. Offres d'emploi à l'extérieur du gouvernement

1) Les secrétaires parlementaires ne doivent pas se laisser influencer dans l'exercice de leurs fonctions officielles par des perspectives ou des offres d'emploi émanant de l'extérieur du gouvernement:

a) ils doivent divulguer au ministre toutes les offres sérieuses d'emploi émanant de l'extérieur du gouvernement qui, à leur avis, les placent dans une situation réelle ou apparente de conflit d'intérêts;

a) ils doivent informer le minitre de toute offre d'emploi émanant de l'extérieur du gouvernement qu'ils auraient l'intention d'accepter;

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c) ils doivent, lorsqu'ils cherchent un emploi à l'extérieur du gouvernement ou envisagent de se lancer dans des activités commerciales après avoir résigné leurs fonctions, s'assurer que leurs initiatives ne mèneront pas à des conflits d'intérêts réels ou apparents et ne nuiront d'aucune façon à leurs fonctions officielles.

2) Les secrétaires parlementaires doivent s'assurer, dans tous les rapports qu'ils entretiennent avec d'anciens titulaires de charges publiques, que leur conduite ne donne pas à penser ni même à soupçonner qu'ils participent à un trafic d'influence, à l'octroi de passe-droits ou de traitements de faveur.

B. Lignes directrices concernant les emplois et les activités commerciales ultérieurs des secrétaires parlementaires

Les lignes directrices suivantes doivent être appliquées de façon à protéger le plus possible la liberté individuelle des anciens secrétaires parlementaires.

Ces lignes directrices ne s'appliquent pas aux anciens secrétaires parlementaires qui demeurent députés, dans la même mesure où elles feraient obstacle à l'exécution de leurs fonctions parlementaires; dans ces circonstances, toutefois, l'ancien secrétaire parlementaire doit prendre soin de se conformer aux lois, règles et conventions pertinentes du Parlement en matière de conflits d'intérêts.

1) Au cours de l'année suivant son départ, le secrétaire parlementaire ne doit pas:

a) accepter un siège au conseil d'administration d'une société commerciale qui entretenait des rapports particuliers d'usage avec le ministère ou l'organisme auquel il était rattaché en permanence, dans la dernière année de son mandat;

b) faire volte-face pour agir au nom ou à la place d'une personne ou d'une sociéteé commerciale dans une procédure, transaction, cause ou autre affaire où le gouvernement du Canada est partie et où lui-même a eu l'occasion de représenter le gouvernement, dans la dernière année de son mandat;

c) exercer des pressions en faveur ou au nom d'une personne ou d'une société commerciale auprès du ministère ou de l'organisme auquel

il était rattaché en permanence dans la dernière année de son mandat.

2) Dans les six mois suivant son départ, le secrétaire parlementaire ne doit pas:

a) accepter un emploi dans une société commerciale avec laquelle il entretenait d'importants rapports officiels, en tant que secrétaire parlementaire, au cours de la dernière année de son mandat;

b) faire volte-face pour agir au nom ou à la place d'une personne ou d'une société commerciale dans une procédure, transaction, cause ou autre affaire qui relevait de sa compétence, au cours de la dernière année de son mandat;

c) donner des conseils à des fins commerciales sur les programmes ou politiques du ministère ou de l'organisme auquel il était rattaché en permanence ou avec lequel il entretenait d'importants rapports officiels, au cours de la dernière année de son mandat.

NOTE: Dans les présentes lignes directrices, "ministère ou organisme" comprend les sociétés de la Couronne, mais non les organismes quasi judiciaires. L'expression "rapports particuliers" dont il est question à l'alinéa 1 (a) signifie que la société était assujettie à un contrôle de ses activités par le ministère ou l'organisme, qu'elle recevait de ceux-ci des subventions, prêts ou autre forme d'aide financière ou qu'elle entretenait avec eux des rapports contractuels.

E. LIGNES DE CONDUITE RELATIVES AUX CONFLITS D'INTÉRÊTS TOUCHANT LES PERSONNES NOMMÉES PAR LE GOUVERNEUR EN CONSEIL

Voici le texte sur les lignes de conduite actuelles relatives aux conflits d'intérêts pour les personnes nommées à des charges publiques par le gouverneur en conseil:

1. OBJET

La présente note de service précise les lignes de conduite du gouvernement relatives aux conflits d'intérêts touchant certaines personnes nommées par le gouverneur en conseil et à leur indiquer comment procéder pour prendre les dispositions nécessaires pour s'y conformer.

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2. CHAMP D'APPLICATION

Les lignes de conduite exposées dans la présente note de service s'appliquent aux personnes nommées par le gouverneur en conseil (désignées ci-après sous le nom de hauts fonctionnaires) auxquelles le Cabinet confie à l'occasion certaines fonctions.

3. LIGNES DE CONDUITE

On s'attend à ce que les fonctionnaires règlent leurs affaires personnelles de façon à éviter tout conflit d'intérêts réel ou possible. Selon le principe fondamental qui régit la politique du gouvernement en cette matière, c'est l'intéressé qui doit faire en sorte de ne pas se trouver dans une situation de conflit d'intérêts.

La règle de base veut que les lignes directrices exposées dans le décret C.P. 1973-4065 du 18 décembre 1973 (voir l'annexe A) intéressant les fonctionnaires s'appliquent mutatis mutandis à tous les hauts fonctionnaires, mais les lignes directrices contenues dans la présente note de service priment. Les dispositions particulières d'une loi ayant trait à cette question continuent, cela va de soi, de s'appliquer.

A. Activités interdites

1) Un fonctionnaire ne peut pas exercer de profession ni diriger ou exploiter une affaire commerciale ou financière pendant la durée de sa charge;

2) Les fonctionnaires ne peuvent continuer ni accepter d'appartenir au conseil d'administration d'une société commerciale. Bien que cette interdiction ne concerne pas les associations à caractère philanthropique ou à but non lucratif, il faudrait prendre grand soin d'éviter tout risque de conflit d'intérêts.

B. Dispositions relatives aux biens

1) Biens à exclure

Les biens personnels appartenant à un haut fonctionnaire, et qui n'ont pas de caractère commercial, ne sont pas soumis aux exigences de dessaisissement ou de divulgation des présentes lignes de conduite. Toutefois, ces biens sont soumis aux lignes de conduite concernant les autres fonctionnaires, comme il a été mentionné ci-dessus.

Parmi les biens à exclure, citons: la ou les résidences effectivement occupées par le fonctionnaire, qui peuvent être une résidence d'hiver ou

d'été, ou une ferme servant effectivement de résidence; les biens ou objets ménagers personnels ou autres biens servant à la vie et aux loisirs quotidiens; les autos, bateaux, motoneiges et autres moyens de transports à usage personnel ou familial, avions privés compris, les espèces numéraires, notamment les comptes-chèques et les comptes d'épargne, les obligations d'épargne du Canada, les titres émis par un gouvernement au Canada, à quelque palier que ce soit, ou par un organisme de ce gouvernement; les régimes d'épargne-retraite enregistrés et les placements effectués dans un fonds mutuel aux fins d'un revenu à la retraite; les dettes.

Si les dettes risquent de créer des conflits d'intérêts, il incombe aux fonctionnaires, en conformité des directives, de demander l'avis de leur ministre ou de leur sous-ministre ou de leur chef administratif.

2) Biens non exclus

En réglant leurs affaires personnelles relativement aux biens non exclus, les fonctionnaires doivent procéder soit par dessaisissement, soit, s'il y a lieu, comme il est indiqué à l'alinée b) ci-dessous, par déclaration publique.

a) Dessaisissement

En vertu du cette méthode, les fonctionnaires doivent se dessaisir eux-mêmes de leurs biens en vendant ou en plaçant en fiducie les valeurs qu'ils détiennent dans une entreprise, commerciale ou financière, et, en particulier, les titres qu'ils possèdent dans des entreprises commerciales dont la valeur pourrait être directement touchée par des décisions prises par le gouvernement en ce qui a trait à une politique existante ou prcjetée.

Les hauts fonctionnaires qui décident de placer leurs avoirs en fiducie ont le choix entre les deux options suivantes: la fiducie en compte bloqué, d'une part, et la fiducie sans droit de regard, d'autre part. Il faut bien veiller à ce que les conditions du contrat de fiducie ne puissent être interprétées des pouvoirs de gestion ou de décision sur les biens ainsi placés.

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(i) La fiducie en compte bloqué

La fiducie en compte bloqué est une formule selon laquelle le fiduciaire a pour instruction de maintenir les avoirs exactement en l'état où ils se trouvaient lors de l'ouverture du compte. Le haut fonctionnaire qui ouvre un tel compte sera habilité à recevoir du fiduciaire les revenus produits par son compte et à être informé de toute déclaration exigée par la loi. Le sous-registraire général adjoint peut agir en qualité de fiduciaire si un haut fonctionnaire désire conclure un accord de fiducie en compte bloqué avec ce dernier.

(ii) La fiducie sans droit de regard

La fiducie sans droit de regard est une formule selon laquelle le fiduciaire est habilité à décider de tout investissement en ce qui a trait à la gestion du compte, sans recevoir de directives de son client ni être soumis à sa surveillance. Dans ce type de compte, pour éviter tout conflit, le haut fonctionnaire n'est informé que du strict nécessaire pour l'évaluation annuelle du compte et pour les déclarations exigées par la loi. Le haut fonctionnaire qui ouvre un compte en fiducie sans droit de regard est habilité à percevoir les revenus produits par son compte et à déposer ou à retirer des capitaux à son gré. (Le sous-registraire général adjoint ne peut agir en qualité de fiduciaire dans un contrat de fiducie sans droit de regard.)

(iii) La durée des fiducies

La durée de toute fiducie se prolonge tant et aussi longtemps que le haut fonctionnaire qui a ouvert un compte continue d'occuper un poste, qui en vertu d'une décision du Cabinet, est soumis aux lignes de conduite exposées dans le présent document.

(iv) Les fiduciaires

Quelle que soit la formule de fiducie considérée, les fiduciaires doivent être choisis avec soin. S'il n'y a qu'un seul fiduciaire, il doit être une personne physique ou une personne morale, banque, société de fiducie ou de placement, qui est publique et a les titres et qualités voulus pour remplir les fonctions d'un fiduciaire, ou un individu qui, de notoriété, remplit ces fonctions dans le cours normal de son travail. Il va de soi qu'aucun lien de dépendance ne doit exister entre le fiduciaire, s'il n'y en a qu'un, et le haut fonctionnaire intéressé. S'il y a plusieurs fiduciaires, il en faut un au moins qui soit une personne publique ou l'une des institutions susmentionnées.

(v) Production des documents de fiducie

Quelle que soit la formule de fiducie choisie, les hauts fonctionnaires doivent toujours remettre au sous-registraire général adjoint deux copies de tout instrument de fiducie et une déclaration portant qu'un compte a effectivement été ouvert. Si l'on excepte cette dernière déclaration, tous les renseignements ainsi fournis, y compris les copies des instruments de fiducie, seront gardés à titre de dossiers confidentiels par le sous-registraire général adjoint qui, une fois que l'instrument de fiducie aura été jugé conforme, dans les détails et par la forme, aux lignes de conduite exposées dans le présent document ou à toutes lignes de conduite émises ultérieurement à l'intention des hauts fonctionnaires, ne le communiquera à personne pour quelque raison que ce soit.

b) Déclaration publique

Les hauts fonctionnaires ont la possibilité de déclarer publiquement certains de leurs biens, afin de pouvoir disposer des biens dont ils désirent garder le contrôle avec plus de facilité. En effet, en déclarant que certains

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biens leur appartiennent, les hauts fonctionnaires pourront les gérer comme n'importe quel autre Canadien, à la seule condition de redoubler de vigilance, pour que les biens qu'ils ont déclarés ou les opérations qu'ils pourraient effectuer ne puissent laisser peser sur eux le moindre soupçon de conflit d'intérêts. Les déclarations publiques faites en vertu de cette option qui est offerte aux hauts fonctionnaires doivent être signalées au bureau du sous-registraire général adjoint pour que ce dernier les consigne dans un registre auquel le public a accès.

Cette option, toutefois, n'est pas sans limites. Elle vise d'abord et avant tout des biens tels que les intérêts de tenure à bail, les biens immeubles, les compagnies privées dont les titres ou les actions ne font pas l'objet d'opérations commerciales à la Bourse, et les autres avoirs dont la valeur ne peut que très difficilement être influencée par la politique du gouvernement. Il n'est pas possible cependant d'utiliser cette formule pour des titres ou valeurs offerts à la Bourse (biens qui doivent être vendus ou placés en fiducie), ou pour des biens dont la gestion pourrait éventuellement provoquer un conflit d'intérêts chez un haut fonctionnaire.

C. Les conjoints et les enfants à charge

Les présentes lignes de conduite ne s'appliquent pas rigoureusement aux conjoints et aux enfants à charge. Aussi, les hauts fonctionnaires devraient-ils garder présent à l'esprit qu'il est de leur devoir de prévenir les conflits d'intérêts, y compris ceux qui pourraient surgir lors de transactions de propriétés ou d'autres avoirs qui appartiennent ou dont la gestion est confiée, en tout ou en partie, à leur conjoint ou à des enfants à leur charge.

4. ARRANGEMENTS ADMINISTRATIFS

A) Réalisation

Les arrangements faits par un haut fonctionnaire pour éviter les conflits d'intérêts seront considérés comme complets lorsqu'ils auront été approuvés par le sous-registraire général adjoint et que le ministre responsable en aura été avisé; si des difficultés surgissent entre le sous-registraire général adjoint et le haut fonctionnaire, c'est

le ministre responsable qui approuvera l'accord ou, dans le cas des sous-ministres et des chefs administratifs, le Premier ministre lui-même.

B) Les frais

Lorsqu'un haut fonctionnaire qui a adopté la formule de la fiducie en compte bloqué a choisi le sous-registraire général adjoint comme fiduciaire, toutes les dépenses administratives engagées par le gouvernement en raison de ce choix seront payées sur les caisses du Trésor public. Dans tous les autres cas, c'est le fonctionnaire intéressé qui devra payer les frais.

C) Registre public

Les hauts fonctionnaires devront signaler au sous-registraire général adjoint toute déclaration publique de leurs intérêts ou de leurs avoirs pour que ce dernier les consigne au registre.

En outre, ils doivent remplir une déclaration générale de conflit d'intérêts, sur laquelle ils indiqueront les arrangements qu'ils ont faits pour se conformer aux lignes de conduite énoncées dans le présent document et à la politique du gouvernement ou à toute autre ligne de conduite qui peut être émise d'ici là, et remettre cette déclaration au sous-registraire général adjoint.

D) Documents

1) Mise en sûreté

Il incombera au sous-registraire général adjoint de s'assurer que tous les documents personnels et confidentiels qui sont confiés à son bureau par les hauts fonctionnaires en vertu des présentes lignes de conduite concernant les conflits d'intérêt, sont placés dans des dossiers personnels et confidentiels, et sont toujours gardés en sûreté. De plus, il est de son ressort de s'assurer que les documents confiés à son bureau à des fins d'enregistrement officiel et d'examen par le public sont placés dans des dossiers non classifiés et conservés en sûreté dans le registre auquel le public aura accès.

2) Renvoi des documents

Si le haut fonctionnaire décède en poste, le sous-registraire général adjont doit fermer et

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rendre immédiatement aux exécuteurs testamentaires le dossier confidentiel conservé dans son bureau de façon que ni le dossier permanent de ses avoirs ni son contrat de fiducie ne restent dans le bureau du sous-registraire général adjoint. Si un fonctionnaire résigne ses fonctions, ou cesse pour tout autre raison d'exercer les fonctions auxquelles le gouverneur en conseil l'avait nommé et, par conséquent, n'est plus soumis à la politique gouvernementale en matière de conflits d'intérêts ou à toute ligne de conduite énoncée dans le cadre de cette politique, le sous-registraire général adjoint, aussitôt informé, scelle le dossier confidentiel du haut fonctionnaire et le lui rend, puis retire le dossier non classifié de l'intéressé du registre public.

5. MARCHE À SUIVRE

On trouvera le détail de la marche à suivre pour mettre les présentes lignes de conduite en pratique à l'annexe B du présent document.

6. INOBSERVATION

Le haut fonctionnaire qui n'agit pas conformément aux lignes de conduite peut être soupçonné d'abus de confiance et est passible de sanctions allant jusqu'à la révocation.

On trouvera dans la partie I de la présente annexe, l'annexe A du décret C.P. 1973-4065, Lignes directrices au sujet des conflits d'intérêts touchant les fonctionnaires. L'annexe B suit.

ANNEXE B

MARCHE À SUIVRE

Les hauts fonctionnaires trouveront ci-dessous la marche à suivre pour s'assurer que leurs affaires personnelles ne peuvent entrer ou risquer d'entrer en conflit avec leurs fonctions:

1. Chaque haut fonctionnaire donne au sous-registraire général adjoint tous les renseignements qui concernent ses placements personnels et autres biens, même ceux qui peuvent être considérés comme biens exclus.

2. Le sous-registraire général adjoint, ou un membre de son personnel, étudie les renseignements présentés par le haut fonctionnaire et fait alors savoir à celui-ci si ses placements ou biens déclarés sont, de l'avis du

sous-registraire, en totalité ou en partie, biens exclus ou si, au contraire, ils sont susceptibles de causer des conflits d'intérêts réels ou éventuels.

3. Si le sous-registraire général adjoint, après examen sérieux des renseignements présentés par un haut fonctionnaire, juge qu'aucun des placements et autres biens dudit haut fonctionnaire ne cause ou ne peut causer de conflits d'intérêts, il en informe l'intéressé par écrit, tout en lui demandant de remplir une déclaration générale de conflits d'intérêts et de la lui renvoyer. Puis, le sous-registraire général adjoint fait savoir au ministre responsable que sur la foi des renseignements communiqués par le haut fonctionnaire, ce dernier satisfait aux exigences des lignes de conduite sur les conflits d'intérêts émises à l'intention des hauts fonctionnaires.

4. Si, par contre, le sous-registraire général adjoint croit que l'exercice, par le fonctionnaire, de ses droits de propriétaire ou de gestionnaire sur une partie ou la totalité de ses placements crée ou risque de créer un conflit d'intérêts, il en informera le haut fonctionnaire par écrit et l'assurera qu'il se tient à sa disposition pour lui expliquer les lignes de conduite.

5. Le haut fonctionnaire doit soumettre par écrit au sous-registraire général adjoint les dispositions qu'il prendra en vue de rectifier la situation, et lui envoyer des exemplaires de tous les documents y afférents, dont deux copies de tout contrat de fiducie, toute déclaration publique et une déclaration générale de conflits d'intérêts. Le sous-registraire général adjoint étudie alors les dispositions proposées et les documents y afférents puis, s'il juge que les mesures prises par le haut fonctionnaire satisfont aux exigences des lignes de conduite sur les conflits d'intérêts émises à l'intention des hauts fonctionnaires, il en informe par écrit le haut fonctionnaire et son ministre.

6. Les lignes de conduite se fondent sur le principe que le haut fonctionnaire et le sous-registraire général adjoint en arriveront sans trop de difficultés à une entente quant aux dispositions que le haut fonctionnaire propose afin de satisfaire aux exigences des directives sur les conflits d'intérêts. Pour ce faire, il incombe au sous-registraire général adjoint et à son personnel (ainsi qu'au fonctionnaire) de s'assurer que, si des difficultés surgissent, toutes les solutions possibles seront envisagées et étudiées minutieusement en vue d'un règlement des problèmes sans recours à quelque supérieur hiérarchique que ce soit. Toutefois, il peut se présenter des cas où le sous-registraire général adjoint ne soit pas d'accord avec

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les mesures proposées par un haut fonctionnaire; de même, le haut fonctionnaire, pour des raisons personnelles bien légitimes, peut juger qu'il devrait, pour se conformer aux lignes de conduite, subir de trop graves inconvénients pour lui-même ou pour sa famille. En pareilles circonstances, le haut fonctionnaire doit d'abord soumettre la question à son sous-ministre ou à son chef administratif, qui pourra décider de demander l'avis de son ministre, ultime autorité en la matière. Si la question implique un sous-ministre ou un chef administratif, il doit consulter le greffier du Conseil privé, qui peut juger la question suffisamment importante pour la porter à l'attention du Premier ministre, à qui appartient alors la décision finale.

Il est toutefois anticipé que les consultations auprès d'un ministre ou du Premier ministre seront plutôt rares.

7. Le sous-registraire général adjoint sera informé du règlement des problèmes mentionnés à l'alinéa 6, et des dispositions prévues par le fonctionnaire touché par ces problèmes.

8. Toute déclaration publique, ainsi que toute déclaration générale de conflit d'intérêts, doit être exacte et toujours à jour; pour ce faire, les hauts fonctionnaires sont priés d'aviser le S.R.G.A. de toute transaction, soit un ajout, un retrait ou autre changement, concernant une propriété ou des biens qui font ou pourront faire l'objet d'une déclaration publique.

9. Même si les biens exclus ne sont pas de fait traités selon les options disponibles dans le cadre des lignes de conduite, les hauts fonctionnaires sont priés d'aviser le S.R.G.A. de toute activité qui pourrait donner lieu de soustraire des biens à exclure, une propriété ou autres biens déjà considérés comme tel.

10. Demandes de renseignements

On doit adresser les demandes de renseignements au sujet des lignes de conduite et les questions générales relatives aux conflits d'intérêts au

Bureau du Sous-registraire général adjoint
Ministère de la Consommation et des Corporations
4e étage, édifice Trafalgar
207, rue Queen
Ottawa, Ontario K1A 0C9

Le numéro de téléphone est: (613) 995-0721.

Government of Canada / Gouvernement du Canada

CONFLICT OF INTEREST STATEMENT
DÉCLARATION CONCERNANT LES CONFLITS D'INTÉRÊTS

I, the undersigned, do hereby state that I am in compliance with the Government of Canada's guidelines on conflict of interest to which I am subject.

Je, soussigné(e), affirme par les présentes que je suis en conformité avec les lignes de conduite relatives aux conflits d'intérêts du Gouvernement du Canada auxquelles je suis assujetti(e).

I do hereby declare:

Je déclare par les présentes que:

☐ all my personal holdings are exempt property.
tous mes biens personnels sont des biens exclus.

☐ I have dealt with all my non-exempt property through the arrangements described below:
pour tous mes biens non-exclus, j'ai procédé par l'une et/ou l'autre des dispositions décrites ci-dessous:

a frozen trust: by instrument dated
une fiducie en compte bloqué: instrument en date du _____

a blind trust: by instrument dated
une fiducie sans droit de regard: instrument en date du _____

a Public Declaration dated
une Déclaration publique en date du _____

I make this statement for the purpose of official registration in the full knowledge that it will be available for public examination in the Conflict of Interest Public Registry.

Je fais la présente déclaration en sachant parfaitement qu'elle sera consignée officiellement dans le Registre public concernant les conflits d'intérêts auquel le public aura accès.

Date of Statement *Date de la déclaration*	Name of Declarer *Déclarant(e)*	Signature

FOR THE USE OF THE DEPUTY REGISTRAR GENERAL

I hereby certify that this statement was filed with the Assistant Deputy Registrar General.

Date filed
Date déposée

À L'USAGE DU SOUS-REGISTRAIRE GÉNÉRAL

Je certifie par les présentes que cette déclaration a été déposée chez le sous-registraire général adjoint.

Deputy Registrar General of Canada
Sous-registraire général du Canada

C O N F L I T S D' I N T É R Ê T S

DÉCLARATION PUBLIQUE

Je soussigné _ _ _ _ _ _ _ _ _ _ _ _ _ déclare par les présentes que je détiens _ _ _ _ _ _ _ _ _ _ _ p. 100 (_ _ _) des actions de la société connue sous le nom de _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _.

Je fais cette déclaration conformement aux lignes de conduite concernant les conflits d'intérêts. Je sais qu'aussi longtemps que je demeurerai soumis aux directives émises à l'intention des

, le public aura accès à la présente déclaration, conservée au bureau du sous-registraire général adjoint.

À Ottawa, ce _ _ _ _ _ _ _ jour de _ _ _ _ _ _ _ 1974.

_____
(signature)

F. LIGNES DIRECTRICES CONCERNANT LES EMPLOIS ULTÉRIEURS DÉTENUS PAR LES AUTRES TITULAIRES DE CHARGES PUBLIQUES

La politique d'ensemble en ce qui a trait aux emplois ultérieurs détenus par les autres titulaires de charges publiques est généralement présentée dans des lignes directrices qui sont en fait constituées des annexes suivantes (elles ont été publiées le 24 avril 1978) et qui formulent les principes, les dispositions réglementaires et les procédures.

ANNEXE I Principes régissant la conduite des titulaires de charges publiques

1) Les personnes occupant ou ayant occupé une charge publique doivent s'assurer, dans l'exercice de leurs fonctions, que l'objectivité et l'impartialité de la fonction publique ne sont pas mises en doute et doivent faire en sorte que la population canadienne n'ait aucune raison de croire au favoritisme envers qui que ce soit - personne ou organisme.

2) Les personnes occupant ou ayant occupé une charge publique doivent agir de façon telle qu'il n'y ait aucune raison de croire en la possibilité d'accéder par privilège, soit au personnel, soit aux services gouvernementaux.

3) Les personnes occupant ou ayant occupé une charge publique doivent veiller, dans la gestion de leurs affaires personnelles, à ne pas tirer profit, ni paraître tirer profit de l'usage ou de la divulgation de renseignements confidentiels obtenus dans l'exercice de leurs fonctions officielles.

ANNEXE II: Lignes directrices à l'intention des titulaires de charges publiques pendant la durée de leur emploi

1) Nul ministre, nul secrétaire parlementaire, nul fonctionnaire, nulle personne nommée par le Gouverneur en conseil, nul membre du personnel "exclu" d'un Ministre ("agent de l'État") ne devrait se laisser influencer dans l'exercice de ses fonctions officielles par des perspectives ou des offres d'emploi émanant du secteur privé:

a) un agent de l'État se doit de divulguer à son supérieur toutes les offres sérieuses d'emploi émanant du secteur privé qui, à son avis, le placent dans une situation réelle ou apparente de conflits d'intérêts.

b) un agent de l'État se doit de divulguer à son supérieur toutes offres d'emploi qu'il étudie sérieusement et qui émanent d'un particulier, d'un organisme ou d'un groupe d'intérêts privé ayant une vocation commerciale et avec lequel il entretient des rapports officiels.

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c) un agent de l'État se doit, dans un délai raisonnable, de divulguer toutes offres d'emploi émanant d'employeurs privés qu'il aurait acceptées.

d) un agent de l'État se doit, lorsqu'il cherche un emploi dans le secteur privé ou lorsqu'il envisage de se lancer dans une activité commerciale quelconque après son départ de la fonction publique, de prendre bien soin de s'assurer que ses initiatives ne mèneront pas à des conflits d'intérêts réels ou apparents, ne nuiront d'aucune façon à ses fonctions officielles, et n'impliqueront pas de négociations à caractère commercial avec d'autres fonctionnaires, sans l'autorisation de son supérieur.

2) Les agents de l'État ont l'obligation de s'assurer, dans tous les rapports officiels qu'ils entretiennent avec d'anciens agents de l'État, que leur conduite ne donne pas à penser ou même à soupçonner qu'ils participent à un traffic d'influence, à l'octroi de passe droits ou de traitements de faveur.

Note: "Personnes nommées par le Gouverneur en conseil" désigne les personnes nommées par le Gouverneur en conseil ou un ministre, ou avec leur appobation, ou qui reçoivent un traitement fixé par le Gouverneur en conseil et qui occupent des postes à plein temps dans un ministère, une société de la Couronne ou un organisme public autonome, et non pas les personnes qui sont membres d'organismes dont les fonctions sont d'abord et avant tout quasi judiciaires.

ANNEXE III: Lignes directrices applicables aux anciens titulaires de charges publiques

Les lignes directrices suivantes traduisent concrètement les principes énoncés à l'annexe I. On doit les appliquer en se conformant à ces principes et en veillant à protéger le plus possible la liberté individuelle des fonctionnaires et ex-fonctionnaires.

Les lignes directrices suivantes s'appliquent aux anciens agents de l'État. Elles incluent les dispositions prises avant et après leur départ de la fonction publique. Les anciens ministres, sous-ministres, chefs d'organismes gouvernementaux et membres du personnel "exclu" au niveau du sous-chef devront s'abstenir, pendant une période de deux ans, de participer aux types d'activité de la catégorie A et différer pendant une année toute participation aux activités de la catégorie B, alors que les

périodes correspondantes pour les secrétaires parlementaires, les autres personnes nommées à plein temps par le Gouverneur en conseil, les fonctionnaires et les membres du personnel "exclu" occupant des postes équivalents ou supérieurs au niveau SXI seront d'un an pour la catégorie A et de six mois pour la catégorie B. Ces lignes directrices ne s'appliquent pas aux personnes embauchées dans le cadre du programme Échanges Canada. Notre politique donnera à chaque ministre le droit d'assujettir à ces lignes directrices d'autres fonctionnaires, personnes nommées par le Gouverneur en conseil et membres du personnel "exclu", y compris ceux qui travaillent principalement, quoique non exclusivement, pour le gouvernement ou l'un de ses organismes. Les comités consultatifs pourront, sur demande d'un ministre ou sous-ministre et avec l'approbation du Premier ministre (dans le cas des sous-chefs) du ministre responsable (dans le cas des autres personnes nommées à plein temps par le Gouverneur en conseil et du personnel "exclu") et du Conseil du Trésor (dans le cas des fonctionnaires), soustraire à l'application des présentes lignes directrices tous postes ou groupes de postes lorsqu'ils jugeront qu'il est dans l'intérêt public de le faire.

Catégorie A

1. Un ancien agent de l'État ne doit pas, au cours de la période visée, accepter un siège au Conseil d'administration d'une société commerciale qui entretenait, de toute évidence, des rapports particuliers avec le dernier ministère ou organisme pour lequel il travaillait. L'expression "rapports particuliers" signifie que la société était assujettie à un contrôle d'activité par le ministère ou l'organisme, qu'elle recevait de ceux-ci des subventions, prêts ou autre forme d'aide financière ou qu'elle entretenait avec eux des rapports contractuels.

2. Un ancien agent de l'État ne doit pas, au cours de la période visée, faire volte-face pour agir au nom ou à la place d'une personne ou d'une société commerciale dans une procédure, transaction, cause ou autre affaire où le gouvernement du Canada est parti et où lui-même a eu l'occasion de représenter un ministère ou organisme gouvernemental.

3. Un ancien agent de l'État ne doit pas, au cours de la période visée, exercer des pression, en faveur ou au nom d'une personne ou société commerciale auprès du ministère ou organisme gouvernemental qui l'employait ou avec lequel il entretenait des rapports officiels directs au cours des deux années précédant son départ.

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Catégorie B

1. Un ancien agent de l'État ne doit pas, au cours de la période visée, accepter un emploi dans une société commerciale avec laquelle il a officiellement fait affaire de façon significative au cours de l'année précédant son départ.

2. Un ancien agent de l'État ne doit pas, au cours de la période visée, faire volte-face pour agir au nom ou à la place d'une personne ou d'une société commerciale dans une procédure, transaction, cause ou autre affaire qui relevait de sa compétence en tant qu'employé du gouvernement au cours de l'année précédant son départ.

3. Un ancien agent de l'État ne doit pas, au cours de la période visée, donner des conseils à des fins commerciales sur les programmes ou politiques du ministère ou de l'organisme, qui l'employait ou avec lequel il entretenait d'importants rapports officels au cours de l'année précédant son départ.

Lorsque, à la suite de la divulgation d'une offre d'emploi conformément à l'alinéa 1 a) ou 1 b) de l'annexe II, on demande l'avis d'un comité consultatif au sujet de l'application des paragraphes A1 et B1, le comité peut décider que la "période visée" par ces paragraphes doit commencer à la date où l'agent de l'État dévoile l'offre d'emploi ou à toute autre date postérieure à cette divulgation, mais antérieure à celle où l'agent de l'État quitte la fonction publique.

Note: L'expression "agent de l'État" englobe les anciens agents de l'État, tel que défini à l'annexe II, et l'expression "personne nommée par le Gouverneur en conseil" a la même signification qu'à l'annexe II.

ANNEXE IV: Dispositions réglementaires

Des comités consultatifs ont été constitués et chargés de déterminer les modalités d'application pratiques des lignes directrices énoncées et d'expliquer aux ministres, secrétaires parlementaires, fonctionnaires, personnes nommées par le Gouverneur en conseil et aux membres du personnel "exclu" qui quittent leur emploi comment celles-ci s'appliquent à leur cas précis. Ces comités présenteront aussi des rapports sur l'application des lignes directrices et recommanderont au besoin des changements. Les comités sont autorisés à recommander des exemptions à l'application des lignes directrices lorsqu'ils le jugent nécessaire, en toute justice pour les personnes visées ou dans l'intérêt public. De telles recommandations sont faites au Premier ministre (dans le cas des ministres, des secrétaires

parlementaires et des sous-chefs), au ministre responsable (dans le cas des personnes nommées à plein temps par le Gouverneur en conseil et du personnel "exclu") et au Conseil du Trésor (dans le cas des fonctionnaires).

Un comité consultatif présidé par le Président du Conseil du Trésor et composé de ministres choisis a été établi pour conseiller les ministres et les secrétaires parlementaires sur l'interprétation à donner à ces lignes directrices dans leur application à des cas bien précis.

Un comité consultatif composé du greffier du Conseil privé et du secrétaire du Cabinet pour les relations fédérales-provinciales, du secrétaire du Conseil du Trésor, du président de la Commission de la Fonction publique et du sous-ministre de la Justice a aussi été créé pour conseiller toutes les personnes "exclu" sur l'interprétation qu'il conviendrait de donner à ces lignes directrices dans leur application à des cas bien précis. Le comité fera part de ses recommandations au Premier ministre ainsi qu'à l'intéressé. De son côté, le Premier ministre informera la Chambre de toute dérogation aux avis du comité la part de personnes nommées par le Gouverneur en conseil ou de membres du personnel "exclu".

Des dispositions analogues ont été prises pour conseiller les fonctionnaires nommés aux termes de la Loi sur l'emploi dans la fonction publique. En outre, le Premier ministre encourage toutes les société de la Couronne et tous les organismes autonomes à adopter des lignes directrices et des dispositions semblables à l'égard de leurs cadres supérieurs qui ne sont ni des fonctionnaires, ni des employés nommés par le Gouverneur en conseil. Une requête spéciale sera présentée afin que les membres des Forces armées et de la Gendarmerie royale soient également inclus.

La politique s'appliquera à toutes les personnes nommées à de nouveaux postes au sein du gouvernement et de ses organismes. Nous nous attendons à ce que ces personnes se fassent un point d'honneur de se conformer de leur plein gré à ces lignes directrices. Avant d'être assermenté, chacun sera invité à lire attentivement ce texte et à se comporter en conséquence. Quoique la politique ne s'applique pas officiellement aux fonctionnaires en place, à moins qu'ils acceptent un nouveau poste dans la fonction publique, nous nous attendons à ce qu'ils continuent de s'y conformer.

ANNEXE V: Lignes de conduite pour l'embouchage d'anciens fonctionnaires par le gouvernement

1) Afin de réduire la possibilité de conflits d'intérêts, toutes personnes ayant par le passé été nommées par le Gouverneur en conseil et tous anciens fonctionnaires faisant

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partie d'un groupe de pression ou agissant comme consultant à des fins commerciales en ce qui concerne l'activité gouvernementale seront jugés inadmissibles à une nomination au Conseil d'administration d'une société de la Couronne ou de toute autre société dont le gouvernement est le principal actionnaire tant qu'ils exerceront ce type d'activité.

2) Le ministre intéressé ou le Conseil du Trésor, selon le cas, approuvera tous contrats de service personnel comportant le versement d'une somme égale ou supérieure à $2,000 à des personnes qui ont déjà fait l'objet d'une nomination par décret ou à des fonctionnaires qui reçoivent une pension de retraite du gouvernement. Par la même occasion, le ministre intéressé examinera attentivement le montant global des avantages que le bénéficiaire reçoit par cumul de sa pension de retraite et du montant du contrat.

G. MENTION DE LA QUESTION DES CONFLITS D'INTÉRÊTS DANS LES CONTRATS D'ENGAGEMENT

Les contrats d'engagement des titulaires de charges publiques comportement habituellement la clause suivante:

> "J'aimerais attirer votre attention sur le fait que les employés de la fonction publique doivent se conformer aux "Lignes directrices au sujet des conflits d'intérêts touchant les fonctionnaires". En vertu de l'article 6 de ces lignes directrices, les employés doivent divulguer à leurs supérieurs tous leurs intérêts financiers, commerciaux ou d'affaires qui pourraient vraisemblablement être interprétés comme venant en conflit réel ou éventuel avec leurs fonctions officielles. Nous avons joint au contrat d'engagement une copie de ces lignes directrices dont vous devriez prendre connaissance. ... Veuillez confirmer l'acceptation de cette offre en signant et en retournant la copie reçue en duplicata de cette lettre d'offre...

Certaines lettres d'offre, qui constituent l'essentiel du contrat d'engagement, ne font que la mention suivante: "De plus, j'aimerais vous rappeler que les employés de la fonction publique du Canada doivent se conformer aux "Lignes directrices au sujet des conflits d'intérêts touchant les fonctionnaires".

Nous avons trouvé dans de nombreuses conventions collectives la mention suivante concernant les conflits d'intérêts:" A moins que l'employeur ne spécifie qu'il s'agit d'un travail ou d'une fonction qui pourrait constituer un conflit d'intérêts, les employés ont le droit d'occuper un autre poste après leurs heures de travail."

H. SERMENTS OU AFFIRMATIONS

Voici le texte de serment ou de l'affirmation d'allégeance, de serment ou de l'affirmation d'office et de discrétion, du serment ou de l'affirmation que doivent prêter les membres du Conseil privé.

SERMENT OU AFFIRMATION D'ALLÉGEANCE

Vous, , jurez (ou affirmez) d'être fidèle et de porter sincère allégeance à sa Majesté la Reine Elizabeth Deux, à ses héritiers et à ses successeurs en conformité de la loi.

Ainsi Dieu vous soit en aide.
(omettre dans le cas d'une affirmation)

SERMENT OU AFFIRMATION D'OFFICE ET DE DISCRÉTION

Je, , jure (ou affirme) solennellement et sincèrement que je remplirai avec fidélité et honnêteté les fonctions qui m'incombent en raison de mon emploi dans la Fonction publique et que, sans être dûment autorisé, je ne révélerai ou ne ferai rien connaître de ce qui viendra à ma connaissance par suite de cet emploi. (Dans le cas d'une prestation de serment ajouter: "Ainsi Dieu me soit en aide")

SERMENT OU AFFIRMATION PRÊTÉ PAR LES MEMBRES DU CONSEIL PRIVÉ

Vous, , promettez solennellement et jurez (affirmez) de servir Sa Majesté avec loyauté et fidélité au sein de son Conseil en ce Dominion du Canada; de garder le secret absolu sur les questions qui y seront traitées, débattues ou résolues, sans en divulguer ni révéler le tout ou une partie de vive voix, par écrit ou autrement à quiconque n'est pas du Conseil, mais seulement à ceux qui y sont membres. Si, cependant, quelque question ainsi proposée, traitée ou débattue concerne de près ou de loin la loyauté ou la fidélité envers Sa Majesté la Reine d'un membre assermenté dudit Conseil, vous ne lui ferez aucune révélation, conservant envers lui le même silence qu'envers toute autre personne, jusqu'à ce que le bon plaisir de Sa Majesté la Reine ait été manifesté à ce sujet. En toute chose proposée, traitée et débattue en Conseil, vous déclarez fidèlement, honnêtement, et en toute vérité, votre sentiment et votre opinion, ne considérant que l'honneur et le bien de Sa Majesté la Reine et l'intérêt de ses sujets, sans partialité, sans exception de personnes, et sans réticence aucune, qu'elle soit motivée par la considération, la faveur, l'affectation, les promesses, le déplaisir ou la crainte de qui

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que ce soit. En général, vous agirez en tout ce qui concerne les affaires de Sa Majesté la Reine avec vigilance, diligence et circonspection. En bon conseiller, vous ferez honneur à vos engagements et accomplirez fidèlement vos devoirs avec toute la force, la volonté et le jugement dont vous êtes capable.

AINSI DIEU VOUS SOIT EN AIDE
(omettre dans le cas d'une affirmation)

I. LIGNES DIRECTRICES AU SUJET DES CONFLITS D'INTÉRÊTS TOUCHANT LES FONCTIONNAIRES

C.P. 1973-4065

LIGNES DIRECTRICES AUXQUELLES LES FONCTIONNAIRES DOIVENT SE CONFORMER EN CAS DE CONFLITS D'INTÉRÊTS

Titre abrégé

1. Les présentes lignes directrices peuvent être citées sous le titre: Lignes directrices au sujet des conflits d'intérêts touchant les fonctionnaires.

Lignes directrices

2. Il ne suffit nullement qu'une personne qui occupe un poste de responsabilité dans la fonction publique observe la loi. Il lui fut non seulement se conformer à la loi, mais avoir également une conduite si irréprochable qu'elle puisse résister à l'enquête la plus minutieuse. Pour que leur intégrité et leur impartialité soient à l'abri de tout doute, les fonctionnaires doivent faire en sorte de ne pas être en reste avec une personne qui pourrait vouloir se faire accorder par eux une compensation ou un avantage particulier ou chercherait par tous les moyens à obtenir d'eux un traitement de faveur. De même, ils ne doivent pas avoir d'intérêts pécuniaires susceptibles d'entre en conflit de quelque manière que ce soit avec l'exercice de leurs fonctions officielles.

3. Il ne doit y avoir ni sembler y avoir de conflit entre les intérêts privés des fonctionnaires et leurs fonctions officielles. Une fois nommés, les fonctionnaires doivent gérer leurs affaires personnelles de manière à éviter tout conflit d'intérêts.

4. Les fonctionnaires doivent veiller, dans la gestion de leurs affaires personnelles, à ne pas se servir ni sembler se servir à leur avantage de renseignements obtenus dans l'exercice de leurs fonctions officielles et qui, de façon générale, ne sont pas accessibles au public.

5. Les fonctionnaires ne doivent pas se mettre dans une situation où ils pourraient retirer des profits ou des intérêts directs ou indirects de tout contrat gouvernemental sur l'adjudication duquel ils peuvent exercer une influence.

6. On s'attend à ce que tous les fonctionnaires divulguent à leurs supérieurs, d'une manière qui doit être notifiée, tous leurs intérêts financiers, commerciaux et d'affaires dans les cas où ceux-ci pourraient vraisemblablement être censés venir en conflit réel ou éventuel avec leurs fonctions officielles.

7. Les fonctionnaires ne doivent occuper aucun poste ni emploi extérieur dont les exigences pourraient être inconciliables avec leurs fonctions officielles ou mettre en cause leur aptitude à remplir ces fonctions de façon objective.

8. Dans l'exercice de leurs charges officielles, les fonctionnaires ne doivent pas accorder de traitement de faveur à leurs parents ni à leurs amis ni à des organismes dans lesquels eux-mêmes, leurs parents ou leurs amis ont des intérêts financiers ou autres.

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ANNEXE E

AVANT-PROJET

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-000

Loi visant à ce que les titulaires de charges publiques se conforment à certains principes de conduite, portant création du Bureau de l'éthique dans le secteur public, lequel est placé sous la direction d'un conseiller en éthique, et touchant d'autres questions connexes.

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

Titre abrégé

1. La présente loi peut être citée sous le nom de Loi sur l'éthique dans le secteur public.

OBJET

2. La présente loi a pour objet:

a) d'accroître la confiance de la population dans l'intégrité des titulaires de charges publiques;

b) d'établir des règles claires de conduite professionnelle s'appliquant à tous les titulaires de charges publiques oeuvrant au sein de l'administration gouvernementale du Canada (y compris les ministères, commissions, sociétés d'État, conseils, offices, bureaux, organismes et tribunaux, ainsi que leurs organismes et leurs subdivisions politiques) et à toute personne nommée par le gouverneur en conseil ou un ministre;

c) de minimiser les risques de conflits entre les intérêts privés et publics des titulaires de charges publiques;

d) de mettre en pratique ce qui précède de façon à préserver l'independance des juges et des organismes quasi judiciaires contre toute ingérence gouvernementale; et

e) d'encourager les citoyens possédant l'expérience et les compétences requises à solliciter et à accepter une charge publique, et de faciliter les mouvements entre les secteurs privé et public.

INTERPRÉTATION

3. Dans la présente loi, on entend par

"organisme quasi judiciaire",tout tribunal, conseil, office, commission ou organisme du gouvernement du Canada qui est amené, de par ses fonctions, à discuter et à trancher certaines questions mettant en cause des intérêts opposés;

"titulaire de charge publique", les agents et les employés de Sa Majesté du chef du Canada et, plus précisément, les ministres, les secrétaires parlementaires, les personnes nommées par le gouverneur en conseil, les fonctionnaires, les membres du personnel soustrait des ministres, les agents, directeurs ou employés de conseils, offices, commissions, tribunaux, sociétés de la Couronne et autres organismes fédéraux, les agents et les employés du Parlement du Canada, ainsi que les membres des Forces armées canadiennes et de la Gendarmerie royale du Canada;

"titulaire non élu de charge publique", tous les titulaires de charges publiques à l'exception des ministres, des secrétaires parlementaires et des membres du personnel soustrait des ministres.

CODE D'ETHIQUE

Force exécutoire du code

4. Tous les titulaires de charges publiques, actuellement en poste ou nommés ultérieurement, doivent se conformer aux principes de conduite suivants:

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Préambule

Servir son pays est une noble tâche. Quelle que soit l'importance de leurs fonctions, les titulaires de charges publiques portent une partie de la responsabilité de la destinée de leur pays et de la confiance que les Canadiens accordent à leur gouvernement.

La confiance de la population repose sur sa conviction que les titulaires de charges publiques ont une conduite conforme à l'éthique.

Pour servir ces préceptes, les principes de conduite suivants s'appliquent obligatoirement à tous les titulaires de charges publiques.

Principes

1. Il ne suffit nullement que les titulaires de charges publiques au gouvernement du Canada observent la loi; ils doivent également avoir une conduite si irréprochable qu'elle puisse résister à l'examen le plus minutieux.

2. L'intérêt public doit toujours primer en cas de conflit entre les intérêts privés et les devoirs officiels des titulaires de charges publiques. Dès leur nomination, ceux-ci doivent prendre les dispositions nécessaires pour éviter tout conflit de cette nature.

3. Il est interdit aux titulaires de charges publiques de solliciter ou d'accepter, mis à part les petits cadeaux et l'hospitalité d'usage d'une valeur nominale, un transfert de valeurs économiques de source privée, même s'il ne s'agit aucunement de corruption. Ce principe s'applique dans le cas où le transfert est facultatif, c'est-à-dire qu'il ne résulte pas d'un contrat ni d'un droit de propriété du titulaire de charge publique.

4. Il est interdit aux titulaires non élus de charges publiques, sans l'approbation préalable de leur supérieur, d'outrepasser leurs fonctions officielles pour venir en aide à des personnes, physiques ou morales, dans leurs rapports avec le gouvernement, lorsque cela peut donner fecu à un traitement de faveur.

5. Il est interdit aux titulaires de charges publiques de se servir à leur propre avantage ou bénéfice de renseignements obtenus dans l'exercice de leurs fonctions officielles et qui, de façon générale, ne sont pas accessibles au public.

6. Il est interdit aux titulaires de charges publiques d'utiliser directement ou indirectement les biens du gouvernement, quels qu'ils soient, y compris les biens loués au gouvernement, ou d'en permettre l'usage, à des fins autres que des activités officiellement approuvées.

7. Il est interdit aux titulaires non élus de charges publiques de se livrer à des activités politiques partisanes qui puissent mettre en doute, réellement ou en apparence, la neutralité politique de la fonction publique.

8. Il est interdit aux titulaires de charges publiques d'exprimer publiquement leur opinion personnelle sur des questions qui font l'objet d'une controverse politique ou sur les politiques ou l'administration du gouvernement (exception faite des questions concernant la négociation collective), si cela risque de diminuer la confiance du public à l'égard de la façon dont ils s'acquittent ou s'acquitteront de leurs fonctions ou si cela risque de nuire aux relations avec d'autres gouvernements.

9. Il est interdit aux titulaires de charges publiques d'exploiter l'autorité de leurs fonctions à des fins privées ou pour leur satisfaction personnelle, ou si cela risque de jeter le discrédit sur le caractère professionnel de la fonction publique.

10. À l'expiration de leur mandat, les titulaires de charges publiques ont le devoir d'agir de façon à ne laisser planer aucun doute quant à la probité et à l'impartialité de l'appareil gouvernemental et à ne diminuer d'aucune façon la confiance du public dans l'intégrité du gouvernement.

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RÈGLES DE PROCÉDURE VISANT À MINIMISER LES CONFLITS D'INTÉRÊTS

Règlements

5. Le gouverneur en conseil peut établir des règlements devant permettre aux titulaires de charges publiques de se conformer aux principes généraux énoncés dans le Code d'éthique et, en particulier, de minimiser les conflits entre leurs intérêts privés et leurs devoirs publics.

BUREAU DE L'ETHIQUE DANS LE SECTEUR PUBLIC

Création du Bureau

6. a) Est par les présentes créé le Bureau de l'éthique dans le secteur public.

Nomination du conseiller en éthique

b) Le conseiller en éthique, qui occupe le poste de chef du Bureau de l'éthique dans le secteur public, est nommé par le gouverneur en conseil.

Personnel

c) Le conseiller en éthique peut déterminer les besoins du Bureau en matière de ressources humaines. Les membres du personnel seront nommés conformément à la Loi sur l'emploi dans la Fonction publique.

FONCTIONS DU CONSEILLER EN ETHIQUE

Rôle consultatif

7. a) Le conseiller en éthique doit conseiller

i) le Premier ministre, concernant les règles de procédure qui s'appliquent aux ministres, aux secrétaires parlementaires et aux titulaires de charges publiques nommés par le gouverneur en conseil;

ii) les ministres, concernant les règles de procédure auxquelles ils sont assujettis, et les membres de leur personnel soustrait; et

iii) les sous-ministres des ministères et les chefs des organismes, concernant les règles de procédure auxquelles eux-mêmes et leur personnel sont assujettis.

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b) Le conseiller en éthique n'est pas responsable devant la loi des conseils ainsi fournis.

c) Si le conseiller en éthique se voit demander de faire enquête conformément à l'article 10 de la présente loi et qui le problème visé a déjà fait l'objet de ses conseils, il doit charger une personne n'appartenant pas au Bureau de l'éthique dans le secteur public de ladite enquête et de rendre public son rapport.

Rôle administratif

8. Le conseiller en éthique doit administrer les règles de procédure établies en vertu de l'article 5 de la présente loi pour aider les titulaires de charges publiques à se conformer aux principes énoncés dans le Code d'éthique, y compris - mais non limitatif - l'établissement ou la surveillance des dispositions relatives aux fiducies, la divulgation requise des intérêts privés des titulaires de charges publiques, et le dessaisissement de certains biens lorsque requis.

Information et éducation

9. Le conseiller en éthique doit fournir aux titulaires de charges publiques et à toute autre personne intéressée, y compris les titulaires éventuels lorsque cela s'avère possible, toute l'information concernant le Code d'éthique, les règles de procédure établies en vertu de l'article 5 de la présente loi, les codes d'éthique complémentaires, les pratiques visant à aider les titulaires de charges publiques à minimiser les conflits d'intérêts et toute autre question connexe.

Rôle d'enquêteur

10. Le conseiller en éthique doit, à la demande du Premier ministre (concernant tout titulaire de charge publique, à l'exception des juges qui sont assujettis à la Loi sur les juges), d'un ministre (concernant tout titulaire de charge publique relevant de son autorité, et avec le consentement du Premier ministre), ou d'un sous-ministre ou du chef d'un organisme (concernant tout titulaire de charge publique relevant de son autorité, et avec le consentement du ministre dont lui-même relève), faire enquête sur toute infraction présumée au Code d'éthique, ou aux règles de procédure établies en vertu de l'article 5 de la présente loi. Aux fins de ladite enquête, le conseiller en éthique doit avoir accès à tous les

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dossiers du gouvernement ainsi qu'à toute l'information pertinente. Le conseiller en éthique doit offrir à tous les intéressés la possibilité d'être entendus et autoriser les personnes faisant l'objet de l'enquête précitée de se faire représenter par un avocat. Les audiences sont publiques ou privées, selon ce que le conseiller en éthique juge approprié. Son rapport sera présenté à la personne qui a demandé l'enquête et sera rendu public dans les trois jours ouvrables qui suivent.

CODES D'ÉTHIQUE COMPLÉMENTAIRES

11. Le conseiller en éthique doit aider les sous-ministres et les chef d'organismes ou de commissions à reformuler les règles des codes d'éthique complémentaires déjà existants concernant leur ministère, commission ou organisme de sorte que le même format, la même terminologie, les mêmes règles et les mêmes interprétations s'appliquent dans tout le gouvernement, il doit aider les sous-ministres et les chefs d'organismes ou de commissions à établir des codes d'éthique complémentaires où il n'existe pas selon l'approche susmentionnée.

POUVOIRS ET DEVOIRS SUPPLÉMENTAIRES

Levée ou modification d'une règle

12. a) Le conseiller en éthique doit, après réception d'une demande écrite de la part du titulaire de charge publique intéressé, avoir l'autorités de lever ou de modifier une règle ou procédure établie en vertu de l'article 5 de la présente loi, si l'application de celle-ci risque d'entraîner des résultats inéquitables ou déraisonnables à l'endroit d'un titulaire de charges publiques, pourvu que les principes énoncés dans le Code d'éthique soient toujours observés, que l'autorisation soit formulée par écrit et clairement justifiée, qu'elle soit rendue publique et qu'une copie soit versée au registre public du Bureau de l'éthique dans le secteur public.

b) Si, pour des raisons d'ordre hiérarchique, le titulaire de charge publique qui sollicite une telle dérogation ou modification ne peut

communiquer directement avec le conseiller en éthique, sa demande écrite doit être accompagnée, selon le cas, du consentement du Premier ministre, du ministre, du sous-ministre ou du chef de l'organisme.

Rapport du conseiller en éthique

13. a) Le conseiller en éthique doit, au plus tard le 31 décembre qui suit la fin de chaque exercice financier présenter un rapport sur les activités de son bureau au cours de ladite année mais ne doit y iclure aucune information confidentielle qui lui a été fournis par un titulaire de charge publique. Le Premier ministre doit faire en sorte que ledit rapport soit présenté à cette date devant le Parlement ou, si celui-ci ne siège pas, dans les quinze jours qui suivent le début des travaux de l'une ou l'autre des chambres du Parlement.

b) Simultanément et relativement au même exercice financier, le Premier ministre doit demander que soit rédigé et présenté devant le Parlement un rapport concernant les mesures prises ou les pénalités imposées à l'endroit de titulaires de charges publiques qui n'ont pas respecté les règles de conduite ni les règles de procédure, ainsi que les accusations portées en vetu du Code criminel ou d'autres lois.

LA MAGISTRATURE ET LES ORGANISMES QUASI JUDICIAIRES

Indépendance

14. a) Dans le but de préserver l'indépendance des intéressés, le gouverneur en conseil ne doit établir aucun règlement en vertu de l'article 5 de la présente loi relativement aux règles qui doivent s'appliquer aux titulaires de charges publiques qui sont des juges ou qui sont nommés par le gouverneur en conseil à titre de membres d'organismes quasi judiciaires.

b) Les règles visant à minimiser les conflits d'intérêts touchant les membres d'organismes quasi judiciaires

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doivent s'inscrire dans les modifications prévues à l'article 20 de la présente loi ou dans les mesures subséquentes qui seront adoptées relativement auxdits organismes.

SOCIÉTÉS DE LA COURONNE

Application des dispositions de la Loi sur les sociétés commerciales canadiennes

15. a) Les dispositions de la Loi sur les sociétés commerciales canadiennes concernant les conflits d'intérêts dans le cas de dirigeants ou d'administrateurs s'appliquent mutatis mutandis à toutes les sociétés de la Couronne du gouvernement du Canada.

b) Plus précisément, le Code d'éthique établi aux fins de la présente loi s'applique à tous les dirigeants, administrateurs et employés des sociétés de la Couronne du gouvernement du Canada; les restrictions relatives aux activités politiques et aux déclarations publiques prévues dans les principes 7 et 8 ne s'appliquent cependant pas aux personnes nommées par le gouverneur en conseil à des postes à temps partiel au sein des conseils d'administration.

c) Chaque société de la Couronne du gouvernement du Canada doit établir son propre code d'éthique complémentaire en précisant, compte tenu de ses exigences et de son mandat particuliers, les règles à suivre pour minimiser les conflits d'intérêts.

d) Dans chaque cas, le code d'éthique complémentaire est établi par la société de la Couronne de concert avec le conseiller en éthique, lequel doit veiller à ce que tous les codes d'éthique complémentaires des sociétés de la Couronne utilisent dans la mesure du possible la même de la terminologie et les mêmes règles de procédure, et que les points particuliers soient traités.

e) Les codes d'éthique complementaires doivent être promulgués sous forme de règlements établis en vertu de la loi régissant chaque société de la Couronne, que ce soit séparément ou dans une loi omnibus.

f) Dans le cas des sociétés d'État qui ont été créées en vertu d'un décret plutôt que d'une loi, les dispositions de la Loi sur les sociétés commerciales canadiennes concernant les conflits d'intérêts doivent figurer dans leur code d'éthique complémentaire, lequel doit être promulgué par décret.

g) Les dispositions qui précèdent doivent s'appliquer à toute nouvelle société de la Couronne.

ACTIVITÉS POLITIQUES

16. (1) Il est interdit à tout sous-ministre ou chef d'organisme et, sauf dans les cas où l'autorise le présent article, à tout autre titulaire non élu de charge publique

a) de travailler pour ou contre un candidat à une élection à la Chambre des communes, à la législature d'une province ou au conseil du Territoire du Yukon ou des Territoires du Nord-Ouest, ou de travailler au nom d'un tel candidat, ainsi que de travailler pour ou contre un parti politique ou de travailler au nom d'un tel parti; ou

b) d'être candidat à une élection mentionnée à l'alinéa a).

(2) Une personne ne contrevient pas au paragraphe (1) pour le seul motif qu'elle assiste à une réunion politique ou qu'elle verse, à titre de contribution, de l'argent pour la caisse d'un candidat à une élection mentionnée à l'alinéa (1)a) ou à la caisse d'un parti politique.

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(3) Nonobstant toute autre loi, sur demande que lui a présentée un titulaire non élu de charge publique (autre qu'un sous-ministre ou un chef d'organisme), le conseiller en éthique peut, s'il est d'avis que, par rapport à la fonction publique, l'efficacité de l'employé, dans le poste qu'il occupe alors, n'aura pas à souffrir du fait qu'il aura été candidat à une élection mentionnée à l'alinéa (1)a), accorder à l'employé un congé sans traitement pour lui permettre de demander à se faire présenter comme candidat et d'être candidat à cette élection, pour une période se terminant le jour où les résultats de l'élection sont officiellement déclarés ou à date antérieure si l'employé a cessé d'être un candidat et qu'il en fait la demande.

(4) Dès qu'il a accordé un congé en vertu du paragraphe (3), le conseiller en éthique doit faire publier un avis à ce sujet dans la Gazette du Canada.

(5) Une personne déclarée élue à une élection décrite à l'alinéa (1)a) cesse dès lors d'être un titulaire non élu de charge publique.

(6) a) Lorsqu'une personne qui est ou a été candidat à une élection décrite à l'alinéa (1)a) allègue au Bureau de l'éthique dans le secteur public qu'un sous-ministre, le chef d'un organisme ou tout autre titulaire non élu de charge publique a contrevenu au paragraphe (1), l'allégation doit être déférée au conseiller en éthique qui doit tenir une enquête au cours de laquelle la personne qui fait l'allégation et le sous-ministre ou le chef de l'organisme ou tout autre titulaire non élu de charge publique en cause ou leurs représentants ont la possibilité de se faire entendre.

b) Lorsqu'il s'agit d'un sous-ministre ou du chef d'un organisme, le conseiller en éthique doit soumettre la décision au gouverneur en conseil qui peut, si le conseiller en éthique a décidé que ce sous-ministre ou ce chef d'organisme a contrevenu aux dispositions du paragraphe (1), destituer l'intéressé.

c) Lorsqu'il s'agit de tout autre titulaire non élu de charge publique, le conseiller en éthique peut, s'il a décidé que la personne en cause a contrevenu au paragraphe (1), recommander au sous-ministre ou au chef de l'organisme qu'elle soit destituée, et cette mesure doit être appliquée sans délai par la sous-ministre ou le chef de l'organisme.

17. L'article 32 de la Loi sur l'emploi dans la Fonction publique est par les présentes abrogé.

CRITIQUES PUBLIQUES

18. a) Lorsqu'un titulaire non élu de charge publique s'engage dans des activités politiques qui ne sont pas mentionnées à l'article 16 mais qui semblent enfreindre le principe 7 du Code d'éthique, ou contrevient d'une certaine façon au principe 8 dudit Code en exprimant publiquement ses vues personnelles sur certaines questions, le problème peut être déféré au conseiller en éthique par le ministre, le sous-ministre ou le chef d'organisme dont relève l'intéressé. Le conseiller en éthique tient alors une enquête au cours de laquelle ce dernier ou ses représentants ont la possibilité d'être entendu, et soumet un rapport à la personne qui a demandé l'enquête.

b) Si l'enquête révèle que l'intéressé a enfreint les principes 7 ou 8, ou les deux, le conseiller en éthique peut recommander dans son rapport qu'il soit

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destitué, et cette mesure doit être appliquée sans délai par le ministre, le sous-ministre ou le chef d'organisme dont relève l'intéressé.

DIVERS

Témoignages sous serment

19. Aucune disposition du Code d'éthique ni aucune règle promulguée en vertu de la présente loi ne peut empêcher un ancien titulaire de charge publique de témoigner sous serment ou affirmation ni d'émettre des déclarations requises sous peine de parjure.

20. Les lois suivantes sont par les présentes modifiées:

a) La Loi antidumping, au chapitre du Tribunal antidumping, par l'insertion de l'article suivant:
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b) La Loi sur le contrôle de l'énergie atomique, au chapitre de la Commission de contrôle de l'énergie atomique, par l'insertion de l'article suivant:
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c) La Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, au chapitre du Conseil de la radiodiffusion et des télécommunications canadiennes, par l'insertion de l'article suivant:
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d) Le Code canadien du travail, au chapitre du Conseil canadien des relations du travail, par l'insertion de l'article suivant:
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e) La Loi sur l'arpentage des terres du Canada, au chapitre dfe la Commission d'examinateurs, par l'insertion de l'article suivant:
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f) La Loi sur l'Office national de l'énergie, au chapitre de l'Office national de l'énergie, par l'insertion de l'article suivant:
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g) La Loi nationale sur les transports, au chapitre de la Commission canadienne des transports, par l'insertion de l'article suivant:
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h) La Loi sur les relations de travail dans la Fonction publique, au chapitre de la Commission des relations de travail dans la Fonction publique, par l'insertion de l'article suivant:
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i) La Loi sur le ministère et la Commission de l'emploi et de l'immigration, au chapitre de la Commission de l'emploi et de l'immigration, par l'insertion de l'article suivant:
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j) La Loi d'urgence de 1979 sur les approvisionnements d'énergie, au chapitre de l'Office de répartition des approvisionnements d'énergie, par l'insertion de l'article suivant:
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k) La Loi anti-inflation, au chapitre des fonctions de l'administrateur, par l'insertion de l'article suivant:
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l) La Loi relative aux enquêtes sur les coalitions, au chapitre de la Commission sur les pratiques restrictives du commerce, par l'insertion de l'article suivant:
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m) La Loi canadienne sur les droits de la personne, au chapitre de a Commission canadienne des droits de la personne, par l'insertion de l'article suivant:
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n) La Loi sur la Commission du tarif, au chapitre de la Commission du tarif, par l'insertion de l'article suivant:
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